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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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ROY L. SCHAPANSKY, *et al.*,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Should this Court resolve a conflict among three federal circuits as to whether Congress intended that, under 5 U.S.C. § 7311(3), anyone who participates in a strike against the federal government (a) *must be automatically* and otherwise arbitrarily removed from federal service (that is, without consideration of mitigating and other relevant factors, including prior imposition of lesser penalties for the same offense under the same statute by the same agency, excellent and lengthy prior public service and unique surrounding circumstances), or (b) *may be automatically* and otherwise arbitrarily removed, at the discretion of the employing agency, or (c) *is entitled, prior to determination of the penalty, to consideration* of all relevant facts?

2. Should this Court resolve a conflict between two federal circuits on the question of whether an affected individual must prove harmful error when a federal agency violates an express minimum procedural requirement imposed by Congress for the benefit of the individual, considering that one circuit answered this question negatively in reliance on this Court's suggestion in *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)?

3. Does a federal agency's violation of the minimum statutory period granted to a federal employee to reply to agency charges render a removal action on those charges "not in accordance with law" or constitute "harmful *per se*" error, thus requiring reversal of the federal employee's removal under the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7513(b), 7701(c)(2)?

4. Should this Court resolve a conflict between two circuits on the question of whether proof of a federal employee's strike activity prohibited by 5 U.S.C. § 7311(3) or the cross-referenced felony statute, 18 U.S.C. § 1918, requires a showing of intent to strike and/or "concerted activity," not just "parallel" action that could be unique to an individual?

5. Should this Court reverse the decision of the Court of Appeals for the Federal Circuit for failing to apply the proper standard of review, as dictated by this Court, to the Merit Systems Protection Board's departure from the Board's own precedent on statutory interpretation issues of manifestly paramount importance to federal labor law?

## LIST OF PARTIES AND CASES

Several petitioners herein had their claims below adjudicated together in a single decision. For purposes of clarity, the following list identifies each party to this petition and the cases in which their claim was decided:

| Name of Petitioner | Federal Circuit Decision (Appendix A) | Merit Systems Protection Board Decision (Appendix B) |
|---|---|---|
| Richard T. Adams | *Adams/Baracco* * | *Adams* |
| Gary S. Baracco ** | *Adams/Baracco* | *Baracco* |
| Richard J. Bender | *Adams/Baracco* | *Adams* |
| Richard Bronleben | *Adams/Baracco* | *Adams* |
| Antonio Chevalier | *Adams/Baracco* | *Adams* |
| Thomas R. Connelly | *Adams/Baracco* | *Adams* |
| Thomas J. Contegni | *Adams/Baracco* | *Adams* |
| Gerard Curran | *Adams/Baracco* | *Adams* |
| Anthony L. DiMasso | *DiMasso* | *Adams* |
| Bernard Dorrance | *Dorrance* | *Adams* |
| James N. Fry | *Adams/Baracco* | *Adams* |
| Allan A. Giannattasio | *Adams* | *Adams* |
| Lawrence G. Martel | *Martel* | *Martel* |
| Stephen J. Moylan | *Moylan* | *Noa* |
| Roy L. Schapansky | *Schapansky* | *Schapansky* |

* The opposing party in all Federal Circuit and Merit Systems Protection Board cases here listed was the Department of Transportation.

** Under Federal Rule of Appellate Procedure 43, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion. *Adams/Baracco v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984).

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the major air traffic controller "lead case" judgments and opinions of the United States Court of Appeals for the Federal Circuit, issued on May 18, 1984.

## OPINIONS BELOW

The majority, concurring and dissenting opinions of the 5-judge panel in the 11 interrelated cases below were designated by the court of appeals as lead cases for thousands of similar appeals stayed pending action by this Court, and are reported at 735 F.2d 477, *et seq.* Petitioners' cases appear as Appendix A hereto. The decisions by the 3-member Merit Systems Protection Board (the Board) which were reviewed by the court of appeals are reported at 1982 FMSR ¶¶ 7047, 7050; 1983 FMSR ¶ 7019, *et seq.*, with petitioners' cases appearing as Appendix B hereto. The decisions by the Merit Systems Protection Board presiding officials which were reviewed by the Board are unreported, and superseded by the full Board's decisions.

## JURISDICTION

All of the interrelated judgments of the court of appeals sought to be reviewed were issued on May 18, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, October 13, 1978, 92 Stat. 1111, codified in scattered sections of 5 U.S.C., provides in pertinent parts as follows:

> § 7513(b)
> An employee against whom an action is proposed is entitled to—
> . . . .
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> * * * *
>
> § 7701(c)
> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
> . . . .
> (B) . . . is supported by a preponderance of the evidence.
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained . . . if the employee . . .
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
> . . .
> (C) shows that the decision was not in accordance with law.

The interrelated civil and criminal federal anti-strike statutes are found in titles 5 and 18, respectively, and provide in pertinent parts as follows:

5 U.S.C. § 7311

> An individual may not accept or hold a position in the Government of the United States . . . if he—
>
> . . . .
>
> (3) participates in a strike . . . against the Government of the United States . . . .

18 U.S.C. § 1918

> Whoever violates the [above-quoted] provision of section 7311 of title 5 . . .
>
> . . . .
>
> Shall be fined not more than $1,000 or imprisoned not more than one year and a day or both.

5 U.S.C. §§ 7311, 7513(b), 7701(c), and 18 U.S.C. § 1918 are reproduced in their entirety as Appendix C hereto.

## STATEMENT OF THE CASE

### Background

Petitioners herein are all air traffic controllers who were discharged by the Federal Aviation Administration (FAA or agency) for alleged strike participation and absence without leave (AWOL) in August of 1981.

The Professional Air Traffic Controllers Organization (PATCO) called a strike by its members against the agency beginning on August 3, 1981. On August 3, 1981, at approximately 11 a.m., EDT, President Ronald Reagan made the following widely publicized announcement regarding the strike:

> "I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated."

*Schapansky v. Department of Transportation*, 735 F.2d 477 (Fed. Cir. 1984) (*Schapansky*) App. A at 1a, 6a n.4.

Massive confusion existed regarding how this Presidential deadline would be applied. In *Ketchem v. Department of Transportation*, 10 MSPB 557, 561 (1982), the Board stated as follows:

> "[i]n view of the multiplicity of the statements issuing from government officials and the contradictions and ambiguities that they involved, it would have been impossible for any defendant to know with the requisite definiteness whether a strike or a government refusal to permit air controllers to work was in progress after the three shifts had reported subsequent to 11 a.m. on August 5."

(quoting *United States v. PATCO*, 524 F. Supp. 160, 164 n.6 (D.D.C. 1981)) (footnote and citations omitted).

The agency implemented the President's 48-hour deadline in a significantly different manner than the President directed. Under FAA General Notice (GENOT) 130 to FAA facilities, controllers were not supposed to be issued notices of proposed termination until they missed their first regularly scheduled shift beginning on or after 11 a.m., EDT August 5. Baracco Appendix at 139, *Adams/Baracco v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984) (Baracco Fed. Cir. App.). However, most of the persons who were expected to comply with this deadline—the individual air traffic controllers—were not advised of the agency's departure from the President's directive.[1] Nevertheless, nationwide, approximately 1,200 controllers returned to duty prior to what turned out to be their deadline shift and were not disciplined. *Schapansky*, App. A at 6a n.4. *See PATCO v. Department of Transportation*, 529 F. Supp. 614, 615 (D. Minn. 1982). Individuals who missed their deadline shift were not permitted to report for work, even if they attempted to do so. *See, e.g., Martel v. Department of Transportation*, 735 F.2d 504 (Fed. Cir. 1984) (*Martel*), App. A at 39a, 43a.

With the exception of the inserted dates and names, each notice of proposed removal to employees was identical, charging participation in a strike against the United

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[1] The agency selectively called only certain air traffic controllers to advise them of their deadlines. *Matson v. Department of Transportation*, MSPB No. DE075281F0748 (Sept. 30, 1983).

States government forbidden by 5 U.S.C. § 7311 and 18 U.S.C. § 1918 and absence without leave until the date of the notice of proposed removal (the date of the individual's "deadline shift"). Baracco Fed. Cir. App. at 131.

Each proposed removal letter invoked the provision of 5 U.S.C. § 7513(b), which requires that a charged employee be given a "reasonable time, but not less than 7 days" to reply to the agency's charges. These letters, however, required an answer "*within*" 7 calendar days.

Petitioners submitted written requests seeking, *inter alia*, information concerning discipline imposed in similar situations in the past, to enable them to respond to the charges, and for an extension of the time to reply to the charges. These requests were all denied in accordance with agency directives delineated in GENOT 147, Baracco Fed. Cir. App. at 141.

The agency determined that unexplained absence during a deadline shift was sufficient proof of illegal striking. No other proof of intent or concerted activity was required, although some additional evidence (*e.g.*, proof of picketing) was considered in individual cases. The FAA admits that it "determined as a matter of policy, that all individuals found to have participated in the unlawful strike would be removed" without consideration of other relevant factors. Respondent's Response to National Interrogatory No. 20, App. D at 165a.

**Proceedings Below**

Each petitioner filed a timely petition for appeal, received a hearing and an adverse decision from a presiding official of the Board, and subsequently filed a timely petition for review with the 3-member Board. In a series of designated "lead case" decisions rendered in 1982 and 1983, the Board upheld each petitioner's removal. A 5-judge panel of the Federal Circuit upheld the Board's lead case decisions regarding each petitioner.[2]

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[2] A petition for *certiorari* has been filed in the related lead case of *Campbell v. Department of Transportation*, 735 F.2d 497 (Fed.

## REASONS FOR GRANTING THE WRIT

### 1. THE COURT BELOW SUSPENDED THOUSANDS OF SIMILAR APPEALS, PENDING POSSIBLE REVIEW BY THIS COURT OF THESE LEAD CASES, WHICH RAISE ISSUES OF COMPELLING PUBLIC IMPORTANCE.

Cases and issues embraced by this petition originally were selected by the Merit Systems Protection Board and designated as the "lead" air traffic controller cases and issues, the resolution of which would affect directly or resolve similar pending appeals brought by thousands of other air traffic controllers who were discharged for allegedly striking in August 1981. 48 Fed. Reg. 2235-36 (Jan. 18, 1983).

On February 24, 1983, the court of appeals entered an order suspending all other air traffic controller cases, and delaying docketing until it made its decision on the lead cases and issues on a consolidated basis. The court recognized the compelling importance of these lead cases by assigning them to a 5-judge panel. On May 18, 1984, the court of appeals decided these lead cases and issues and sent a Notice to Counsel and Petitioners in Air Traffic Controller Litigation. This notice enclosed copies of the "opinions in the Air Traffic Controller 'Lead Cases,'" and stated that the suspension, "in all other Air Traffic Controller cases will remain in effect until final disposition of all the 'Lead Cases.'"[3]

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Cir.), *petition for cert. filed*, No. 84-78 (U.S. July 18, 1984), and counsel for petitioners has been informed that a petition for *certiorari* will be filed in the related lead case of *Anderson v. Department of Transportation*, 735 F.2d 537 (Fed. Cir. 1984).

[3] The court apparently took the unusual action of continuing the suspension, rather than disposing of the other cases on the basis of the lead cases, because of its assessment of the likelihood that this Court would review the decisions in this potentially landmark litigation. It is submitted that such a judgment by the court of appeals of the nature of the issues and cases involved is worthy of weight in consideration by this Court.

The court of appeals' Notice to Counsel and Petitioners in the suspended cases cited its decisions imposing strong sanctions against "the prosecution of frivolous appeals." This will likely have a chilling effect even on many of those with factually distinguishable cases, particularly those who have filed *pro se* appeals with the court. Rejection of this petition would result in the worst possible situation—leaving unanswered many issues of critical importance to all federal employees and sealing the fate of certain employees whose arguments never will be heard. Thus, an early and definitive resolution by this Court of controlling general issues is crucial.[4]

Apart from the large number of non-party discharged air traffic controllers affected directly by these lead cases, the broadly applicable statutory construction issues presented are unsettled, are likely to recur and are not limited to the Federal Circuit. For example, resolution of the harmful error rule's applicability to agency departures from statutory or constitutional requirements will have a broad impact on a wide variety of cases. The court of appeals in effect repealed the statutory requirement of an irreducible minimum 7-day reply period before disciplining any federal employee, creating confusion as to whether there is *any* minimum reply period. Definition of what constitutes a *prima facie* case of striking against the government will determine the showing necessary before any federal employee loses his or her freedom, job or, because the government has a monopoly on a career in the air traffic controller cases, the ability to practice a chosen profession.

This Court should resolve a conflict among the circuits on whether removal for striking against the government is (1) automatic and mandatory; (2) up to the agency's total and unreviewable discretion; or (3) may be imposed only after a rational, judicially-reviewable agency deci-

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[4] *See Laing v. United States*, 423 U.S. 161, 167 (1976); *United States v. Standard Oil Co.*, 332 U.S. 301, 302 n.2 (1947); *United States v. Powell*, 330 U.S. 238, 240 (1947).

sion. The lack of any clear guidance as to the applicable legal standards is critical, especially in view of the likelihood of future federal sick-outs and wildcat strikes recurring from time to time.[5]

The court of appeals asserted that—

> We join enthusiastically in the general desire for symmetry in law and procedure, and nothing here said is thought to make a fundamental difference in either (*except perhaps for recognition that mitigation is irrelevant when striking is proved, infra*).

*Schapansky*, App. A at 7a (emphasis added). After admitting that "[i]deal justice, and government personnel regulations, envisage equal treatment of persons similarly situated," *Schapansky*, App. A at 15a, the court of appeals declined to consider whether other federal government strikers who were treated far more leniently were in fact similarly situated. Moreover, the court of appeals failed to justify its singling out striking as the only offense where mitigation and comparable treatment are *not* relevant.

**2. DENIAL OF THE STATUTORILY-MANDATED MINIMUM PERIOD TO REPLY TO AGENCY CHARGES REQUIRES REVERSAL OF THE AGENCY ACTION; THE COURT OF APPEALS' FAILURE TO SO HOLD IS ERRONEOUS AND CONFLICTS WITH A CIRCUIT COURT DECISION THAT RELIED UPON THIS COURT'S ANALYSIS.**

Under 5 U.S.C. § 7513(b), a federal employee against whom an agency disciplinary action is proposed is entitled to at least 30 days' advance written notice to answer the charges. However, when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be im-

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[5] Bureau of Labor Statistics figures show that 22 federal and Postal Service work stoppages (strikes within the meaning of 5 U.S.C. § 7311) occurred from 1962 through 1979, involving more than 200,000 employees. "Work Stoppages in Government, 1979," Gov't Employee Rel. Rep. (BNA) Reference File 71: 1011, 1014.

posed (as the agency asserted against petitioners), the employee is entitled to—

> a reasonable time, *but not less than 7 days*, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

5 U.S.C. § 7513(b)(2) (emphasis added). In her concurring opinion in *Adams/Baracco v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984) (*Adams/Baracco*), App. A at 20a, 36a, Judge Nies acknowledged that a minimum 7-day reply period is "unquestionably required by 5 U.S.C. § 7513(b)(2)," a point not disputed by the majority opinion.[6]

Under 5 U.S.C. § 7701(c)(2), the Board may not sustain an agency decision if the employee "shows harmful error in the application of the agency's procedures" or "shows that the decision was not in accordance with law." In petitioner Baracco's case, the Board concluded that the legislative history of the CSRA is ambiguous as to the standard of review Congress intended to apply to violations of statutory procedures. 1983 FMSR ¶ 7021, App. B. at 76a, 85a. Apparently overlooking interpretive regulations derived from non-statutory sources, such as rules of practice and personnel manuals, the Board incorrectly deduced that, because "reasonable and properly promulgated regulations . . . have the force and effect of law," application of the "not in accordance with law"

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[6] On a separate point, Judge Nies' concurring opinion erred in relying upon language from a report on a proposed Senate bill that would have required reversal only where the agency's " 'procedural error substantially impaired the rights of the employees.' " App. A at 37a. Congress specifically *rejected* that language in the bill and its intent as stated in the Senate report. The existing language of 5 U.S.C. § 7701 was derived from the materially different House bill, H.R. 11280, which accorded employees greater procedural rights, including a greater opportunity upon appeal, to demonstrate harmful error. *See, e.g.*, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 7, 21 (1978); *see also Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. ——, 104 S. Ct. 439, 446 (1983) (Congress rejected language from Senate bill).

standard to statutory violations would "render the harmful error provision meaningless since no procedural violations would then be subject to it." *Id.* App. B at 86a.

The Board held that the agency erred by providing petitioner Baracco only six days to reply—a period clearly below the irreducible statutory minimum.[7] App. B. at 91a. The court of appeals upheld the Board's conclusion that petitioner failed to prove by a preponderance of the evidence that the agency's error had a harmful effect upon the outcome before the agency and thus held that reversal was not warranted. *Adams/Baracco*, App. A at 22a-23a n.3. Despite the Board's identification of this question as a separate lead issue,[8] extensive written and oral argument from the parties and an *amicus* brief from one of the prime congressional sponsors of the CSRA, the court affirmed the Board and disposed of the entire issue in a cryptic footnote. *Id.*

In so ruling, the Board and the court of appeals ignored the Court of Claims decision in *Stringer v. United States*, 90 F. Supp. 375 (Ct. Cl. 1950). That decision required strict compliance with Section 14 of the Vet-

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[7] In a letter dated August 14, 1981, denying petitioner Baracco's request for an extension of time to reply, Chief Viselli stated that petitioner had to reply *prior* to August 18, *i.e.*, before the seventh day. Although extensively briefed and argued, the court of appeals' majority opinion ignored this evidence and Board finding, focusing exclusively on a separate issue, and refusing to find that the wording of the proposed removal letter that "you may reply to this notice . . . . within seven days after you receive this letter" itself compelled a reply before the end of the seventh day. App. A at 22a-23a n. 3. The language of the proposed notice was explicit—petitioners had to reply *within* seven days—and clearly required petitioners to reply prior to expiration of the statutory minimum period, thus separately violating 5 U.S.C. § 7513(b).

[8] Whether the provision of less than seven days in which to respond to the charges against an appellant constitutes harmful procedural error under 5 U.S.C. 7701(c)(2)(A), and/or serves to render the FAA's decision in those cases not in accordance with law under 5 U.S.C. 7701(c)(2)(C).

48 Fed. Reg. at 2236.

erans' Preference Act (a predecessor to the CSRA), which in turn provided that federally-employed veterans receive the full statutorily-mandated advance written notice to reply to agency charges.[9] The court of appeals' failure to consider *Stringer* is inconsistent with its concurrent holding in the lead case *DiMasso v. Department of Transportation* (*DiMasso*), that it is bound by pre-CSRA Court of Claims precedent:

> *this court is bound by Court of Claims precedent,* which has held that there is "nothing improper" about about an agency's predetermining the penalty of removal, *provided that the employee has full opportunity to present facts rebutting the charges.*

735 F.2d 526 (Fed. Cir. 1984) (emphasis added); App. A at 60a, 64a. Moreover, this statement conflicts with the court's approval of the agency's imposition of a predetermined penalty on petitioner Baracco despite the agency's failure to afford him a "full opportunity [as defined by 5 U.S.C. § 7513(b)] to present facts rebutting the charges."

In *Ommaya v. National Institute of Health*, 726 F.2d 827, 830-31 & n.5 (D.C. Cir. 1984), the court held that the Board may not apply the harmless error doctrine to a failure to adhere to procedures required by the constitution or statute, because such an application would be contrary to the principles enunciated by this Court in *Kotteakos v. United States*, 328 U.S. 750, 764-

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[9] In reversing the agency action for failure to accord the employee the full statutory time, the Court of Claims stated:

> the law requires not merely that there be time to answer but that there be thirty full days of notice . . . . Nor can we accept defendant's contentions that plaintiff must show wherein he was harmed by the insufficiency of the notice period and that the doctrine of *de minimis non curat lex* applies here. We cannot construe a statute that plainly says "at least thirty days" as meaning "not quite thirty days." The requirements of Section 14 are specific and mandatory. Neither this court, nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required.

*Id.* at 379 (citations omitted).

65 (1946) and by the D.C. Circuit in *White v. Department of the Army*, 720 F.2d 209 (D.C. Cir. 1983).

The D.C. Circuit's decision in *Ommaya* was handed down after oral argument in the present cases. On March 27, 1984, counsel for petitioners submitted the opinion to the Federal Circuit pursuant to Local Rule 16, explicitly referencing the harmful error ruling.[10] Nevertheless, none of the Federal Circuit opinions in these cases discussed either the D.C. Circuit's decision or its rationale.[11]

It is well-established that the rule of harmless error must be used with extreme caution where, as here, basic procedural rights are at stake. *See, e.g., Doe v. Hampton*, 566 F.2d 265, 277-78 n.29 (D.C. Cir. 1977); *Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969). The D.C. Circuit has stated that "the Board should not be in the business of affirming administrative decisions based upon how an agency might have acted if it had followed proper procedures." *Horne v. MSPB*, 684 F.2d 155, 157-58 (D.C. Cir. 1982).[12] Moreover, courts have recognized that some procedural rights are so significant that they constitute "substantial rights of an employee" such that their denial is harmful error, *per se*, "even absent evi-

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[10] Another Federal Circuit decision involving the nature of the requisite harmful error under the CSRA, which was invoked by petitioners and the agency below, is the subject of a pending petition for certiorari filed by the Solicitor General. *Devine v. Nutt*, 718 F.2d 1048 (Fed. Cir. 1983), *petition for cert. filed* No. 83-1673 (U.S. April 13, 1984).

[11] Furthermore, none of the Federal Circuit opinions discussed the argument submitted in an *amicus curiae* brief by the Honorable William F. Ford, who served as chairman of the House Committee which reported the bill that became the CSRA, was a floor manager for the bill in the House and served on the conference committee. Congressman Ford's analysis of the CSRA's legislative history demonstrated that employees should not be required to prove that an agency's violation of the statutory right to a minimum 7-day reply period constituted harmful error.

[12] In *Horne*, the D.C. Circuit reviewed an MSPB decision that relied heavily on the "harmful error" doctrine. *Horne v. Interstate Commerce Commission*, 3 MSPB 259 (1981).

dence that the violation led to a loss of evidence or other measurable adverse effects." *Devine v. White*, 697 F.2d 421, 443 (D.C. Cir. 1983). *See Ryder v. United States*, 585 F.2d 482, 487-88 (Ct. Cl. 1978).

The right to a meaningful opportunity to reply, and the statutory assurance of at least seven days' time to prepare for the reply, are recognized as such "substantial rights." In *Ratley v. Department of the Army*, 11 MSPB 564, 567 (1982), the Board applied this principle to the 7-day requirement.[13]

### 3. THE COURT OF APPEALS' RULING REGARDING THE PENALTY IMPOSED UPON PETITIONERS CONFLICTS WITH ITS OWN RULINGS AND THOSE OF OTHER CIRCUITS, INCLUDING A DISTRICT OF COLUMBIA CIRCUIT DECISION RELIED UPON BY BOTH SIDES BELOW.

Because of a conflict among the circuits on the issue of whether removal is automatic and mandatory for striking, review by this Court is necessary to ensure national uniformity on an issue of paramount importance to the proper functioning of the civil service system.

The Ninth Circuit has held, without any substantive analysis, that 5 U.S.C. § 7311 forbids the continued employment of federal, including Postal Service, strikers. *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983). To the contrary, the Seventh Circuit has held explicitly that the federal government is not required to fire striking employees. In *United States v. PATCO*, 653 F.2d 1134, 1141 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981), which dealt with an alleged 1980 PATCO strike at a single facility, the court reasoned that requiring the federal government to fire all strikers would impair seriously provision of essential services, creating "precisely the sort of result that the statutory pro-

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[13] *See* section 5, *infra*.

visions were intended to prevent." [14] Furthermore, the Second Circuit has noted that, although section 7311 "appears to speak in absolute terms . . . [t]here is a substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers . . . ." *United States v. PATCO*, 438 F.2d 79, 82 n.2 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

Other courts have condoned the practice of imposing lesser penalties than removal on striking federal employees, including air traffic controllers.[15] Moreover, if section 7311 were to require that strikers be fired, it would also bar their rehiring, for it states that a striking employee "may not accept or hold" a government position. Injunctions against strikes by federal workers consistently have included "back-to-work" clauses that would be unlawful if section 7311 were an absolute ban on employment of strikers.[16] Finally, in the instant case, President Reagan's 48-hour moratorium would be *ultra vires* under such an interpretation of section 7311.

In their briefs and oral arguments to the court of appeals, both sides relied upon the following holding of the D.C. Circuit condemning automatic agency imposition of one uniform penalty for a given offense regardless of individual circumstances:

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[14] The government's brief in that case characterized dismissal of striking controllers as "a preposterous remedy for the FAA to consider." It further noted, "In the event of a nationwide strike the overall remedy would be more catastrophic than a strike itself." These statements are inconsistent with respondent's position in the briefs below in the present cases, demonstrating that the government itself is confused on this point.

[15] *Miller v. Bond*, 641 F.2d 997, 1000 (D.C. Cir. 1981); *Benson v. Dow*, 520 F. Supp. 231, 232-33 (W.D. Pa. 1981).

[16] *See, e.g., United States v. Robinson*, 449 F.2d 925, 928 n.6 (9th Cir. 1971); *United States v. Moore*, 427 F.2d 1020, 1022 (10th Cir. 1970); *United States v. PATCO*, 524 F. Supp. at 164; *United States v. Branch 60, National Association of Letter Carriers*, 312 F. Supp. 619, 622 (D. Conn. 1970).

> An agency must therefore select an appropriate disciplinary sanction *based on the specific facts of the particular case before it; it may not automatically impose a fixed penalty for a specific category of misconduct regardless of individual factors.*

*Parsons v. Department of the Air Force*, 707 F.2d 1406, 1410 (D.C. Cir. 1983) (citing *Douglas v. Veterans Administration*, 5 MSPB 313 (1981)) (emphasis added). *See American Federation of Government Employees v. General Services Administration*, 711 F.2d 261, 265 (D.C. Cir. 1983). Despite the unusual unanimous agreement by the parties on the most persuasive applicable precedent, the court of appeals did not cite *Parsons*, and issued a decision squarely in conflict with *Parsons* and the Board's seminal *Douglas* decision.[17]

In addition, the court of appeals' lead case decisions, while purporting not to decide whether removal is mandatory for striking, *Schapansky*, App. A at 14a, adopted a course that, from an equal protection standpoint, is manifestly unfair and unworkable. The court required federal agencies neither (a) to fire all strikers nor (b) to make reasoned penalty choices based on individual circumstances and to justify such decisions in light of alleged disparate punishments imposed in comparable situations. Instead, the court essentially held that Congress, in enacting section 7311, intended to allow federal agencies to be arbitrary, granting them unreviewable discretion to pick and choose at random or on some other irrational basis which situations and individuals will be subject to the ultimate civil service penalty and which will receive little or no punishment for the same conduct.[18]

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[17] *See* section 5, *infra*.

[18] See footnotes 1, *supra* and 34, 35, *infra*, for examples of arbitrary treatment by the agency and the Board. Such unrestrained agency action has been condemned by this Court in a variety of situations. *E.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. ——, 103 S.Ct. 2856 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S.

The court of appeals' affirmance of the penalty imposed in *Schapansky* fundamentally misreads the Board decisions in question and conflicts with the court's own precedent and decisions by other circuits. Illustrating pervasive confusion on this point are two diametrically opposed statements by the court in *Schapansky* of what the Board held below. The court erroneously stated:

> Reading [5 U.S.C.] § 7311 as *mandating removal* when a charge of striking is sustained, the Board rejected Schapansky's contention that removal was unreasonable.

App. A at 5a (emphasis added).[19] The court correctly stated about the same Board decision:

> Sustaining the agency's determination that discharge was an appropriate penalty, the Board *declined to rule on whether it had authority to mitigate* it. In light of 5 U.S.C. § 7311, it held that dismissal "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking."

*Id.* at 12a (emphasis added).

The court's confusion extended to its own precedent, as exemplified by the following statement:

> this court is bound by Court of Claims precedent, which has held that there is "nothing improper" about an agency's predetermining the penalty of removal, provided that the employee has full opportunity to present facts rebutting the charges.

*DiMasso*, App. A at 60a, 64a (citing *Pascal v. United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976)) (footnotes

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156 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). *See also Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976) (disparate treatment of similarly situated applicants arbitrary and capricious because rational basis for decision not discernible from agency order).

[19] The Board in fact stated in *dicta* that the statute *could* be read to mandate removal under one possible reading. *Schapansky*, App. B at 65a, 72a.

omitted). *See Schapansky*, App. A at 19a. Because of this mistaken conclusion that *Pascal* had already decided that issue, the court of appeals failed to engage in any analysis. The language that the court of appeals viewed as foreclosing treatment of this issue consists of an intimation of the Court of Claims in *dicta*. In *Pascal*, the Court of Claims specifically found that the plaintiff's charges that the agency had predetermined to remove him were "not proven." Thus, its subsequent discussion concerning the propriety of the agency making up its mind about the penalty, is pure *dicta* and not binding authority as the court stated in *Schapansky*.

The court of appeals correctly cited its prior ruling that agency penalties will be overturned in either of two situations, where—

> the penalty exceeds that permitted by statute or regulations *or* is so harsh that it amounts to an abuse of discretion . . . . *Weston v. U.S. Department of Housing and Urban Development*, [724 F.2d 943, 949 (Fed. Cir. 1983)].

*Schapansky*, App. A at 12a (emphasis added). Three paragraphs later, however, the court ruled that mitigation is irrelevant in these cases because "Congress has determined that removal is *an* appropriate penalty for striking against the government." *Id.* at 13a (emphasis added). Congress' determination that removal is *an* appropriate penalty obviously only satisfies the first half of the 2-part inquiry set forth in *Weston* and endorsed in *Schapansky*. Court of appeals and Board precedent also required the agency to consider whether, given all the relevant factors, including mitigation and consistency of the penalty with those imposed upon other employees for the same or similar offenses, the penalty was an abuse of discretion.[20] *Nagel v. Department of Health and Human Services*, 707 F.2d 1384, 1386-87 (Fed. Cir. 1983); *Par-*

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[20] *See* section 5, *infra*, on the Board's disregard of its own precedent.

*sons v. Department of the Air Force*, 707 F.2d at 1410; *Douglas v. Veterans Administration*, 5 MSPB at 331-32.[21]

Only if Congress had determined that removal were *the only* appropriate penalty for striking against the government (*i.e.*, removal is mandatory, with no discretion vested in agencies to make reasoned decisions) would all of the numerous potentially relevant factors be irrelevant.[22] The court of appeals explicitly declined to so rule, stating: "Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be decided here." *Schapansky*, App. A at 14a.[23] Indeed, respondent requested that the court avoid this issue,[24] apparently so as to preserve agency discretion not to remove all strikers under all circumstances. What the court failed to recognize, however, is that such discretion must be exercised in a reasonable fashion, after taking due account of all relevant factors. These factors include, *inter alia*, consistency of the penalty with that imposed in comparable situations. The court treated this factor as irrelevant in *Schapansky*, *id.* at 13a, despite the necessity of evaluating consistency to restrain arbitrary agency punishments for the same conduct, varying from no discipline to removal with a permanent bar on re-employment.

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[21] *See* note 31, *infra*, on *Douglas*.

[22] *Douglas* specifically stated that "a penalty may be excessive in a particular case even if within the range permitted by statute or regulation." 5 MSPB at 333 n.71 (citing *Power v. United States*, 531 F.2d 505, 507-08 (Ct. Cl. 1976), *cert. denied*, 444 U.S. 1044 (1980); *Rifkin v. United States*, 209 Ct. Cl. 566, 584-85 (1976), *cert. denied*, 429 U.S. 1098 (1977)).

[23] 5 U.S.C. § 7311 previously read "[n]o person *shall* accept or hold office or employment in the government of the United States who participates in a strike." Pub. L. No. 84-330, § 18 p-r, 69 Stat. 624 (1955), *reprinted in* 1955 U.S. Code Cong. & Ad. News 704 (emphasis added). In 1966, Congress replaced the mandatory word "shall" with the term "may" in the current version of § 7311 "[a]n individual may not accept or hold a position . . . ." Pub. L. No. 89-554, 80 Stat. 378. Apparently, this change was effected to permit reasoned, flexible responses to strikes.

[24] *E.g.*, *Baracco* Federal Circuit Respondent's Brief at 44.

The court erroneously viewed the penalty analysis in all-or-nothing terms; prior court cases approving the continued employment of government strikers "cannot be viewed as forever binding the government against the removal of *any* striker under *any* circumstances." *Schapansky*, App. A at 14a (emphasis added). This straw man misstates the alternative to the court's abdication of its responsibility to decide the issue. The real alternative is Board and judicial review to ensure that the agency made a rational decision and demonstrated legitimate reasons for disparate treatment.

**4. THE COURT OF APPEALS' DECISION THAT PROOF OF MERE UNEXPLAINED ABSENCE DURING A STRIKE CONSTITUTES A *PRIMA FACIE* CASE OF STRIKING AGAINST THE GOVERNMENT CONFLICTS WITH RULINGS BY OTHER FEDERAL COURTS.**

In *Schapansky*, App. A at 10a, the court of appeals held that "[u]nexplained absence during a strike of general knowledge establishes that the employee 'intended' to strike" and thus suffices to constitute a *prima facie* case against an employee. The court concluded that "[i]f a requirement for proof of intent resides in 5 U.S.C. § 7311, (and we need not and do not decide that question here) proof of general intent suffices." *Id.*

In a decision stemming from the same August 1981 PATCO strike involved in the lead cases, however, the Tenth Circuit held that proof of (a) FAA warnings of the illegality of a strike and the requirement to contact the FAA and show availability to work; (b) the defendants' unexplained, unauthorized absence both before and after being ordered to return to duty; and (c) their vote for, and support of, an averted June 1981 strike, may have shown parallel activity, but was insufficient to show the requisite concerted activity in August to prove striking. *United States v. McCubbin*, Nos. 81-2054 through

2063 (10th Cir. Aug. 22, 1983);[25] *see United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982).

The court of appeals attempted to dismiss these cases as "inapt" in *Adams/Baracco*, App. A at 25a, because they were "criminal cases, in which proof must meet a beyond-a-reasonable doubt standard and in which mere proof of absence was found consistent with resignation," citing *McCubbin* and *Martinez*. The "resignation" analysis applies at most, however, only to *Martinez*, leaving an unresolved conflict with *McCubbin*.[26]

Any contention that *McCubbin* is inapplicable to the instant situation solely because it is a criminal contempt case is unconvincing. It is insignificant whether, in establishing a violation of 5 U.S.C. § 7311, the government must prove specific intent beyond a reasonable doubt (as applied in *McCubbin*), by clear evidence (as applied in *Tennessee Valley Authority v. Bailey*, 495 F.Supp. 711 (E.D. Tenn. 1980)) or by a preponderance of evidence (as applicable to the instant case). The important point is that proof of a petitioner's specific intent to withhold his or her services in concert with others is a necessary element of establishing any violation by that petitioner of section 7311.[27] Apparently, the Board previously recognized this principle in the case of *Trick v. Federal Aviation Administration*, 8 MSPB 618, 621

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[25] Tenth Circuit Local Rule 17 provides in relevant part: "Unpublished opinions, although unreported, can nevertheless be cited, if relevant, in proceedings before this or any other court."

[26] The Tenth Circuit, citing the civil standards established in *Tennessee Valley Authority v. Bailey*, 495 F. Supp. 711 (E.D. Tenn. 1980), held that the government did not sustain its burden of proving criminal contempt of the anti-strike order because it proved merely *parallel, not concerted*, activity.

[27] The terms "strike" and "participate in a strike" as used in 5 U.S.C. § 7311 mean "an actual refusal in concert with others to provide services to one's employer." *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.) (3-judge court), *aff'd*, 404 U.S. 802 (1971). This definition was endorsed by the court of appeals in *Schapansky*, App. A at 8a.

(1981), wherein it stated, "the issue as to whether the appellants willfully participated in an unlawful strike may not be determined except on the basis of the intent manifested by the individual appellants."

In the lead cases, however, the Board and the court of appeals failed to apply this standard, choosing instead to hold that a *prima facie* case of striking may be established by merely proving unauthorized absence during a strike of general knowledge. This holding conflicts with *McCubbin* and *Tennessee Valley Authority v. Bailey*, 495 F.Supp. at 712, a civil case which held that proof of the defendants' absence from work without explanation was insufficient to demonstrate that "any one or more of the 21 defendants . . . had actually refused in concert with someone else to provide services to the plaintiff."

**5. THE COURT OF APPEALS APPLIED A STANDARD OF REVIEW TO THE BOARD'S DEVIATION FROM ITS OWN PRECEDENT THAT IS IMPROPER UNDER THIS COURT'S DECISIONS.**

Recent decisions by this Court have mandated a rigorous standard of judicial review for agency departures from a course of behavior or interpretation of a statute. For example, this Court has emphasized that—

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973). Accordingly, an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

*Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. ——, 103

S.Ct. 2856, 2866 (1983).[28] These standards of review have been applied by lower courts in a wide range of factual circumstances.[29]

Review by this Court is necessary to correct the court of appeals' failure to apply the requisite standard of review to the Board's unwarranted departure from its settled course of behavior. The Board decisions that were affirmed by the court of appeals were rife with unexplained, sharp changes in course and departure from established Board precedent. The most dramatic example is the Board's 180 degree departure (without explicitly overruling) from the following holding:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, *any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law.* . . . [W]e find that a suspension taken without complying with the procedural requirements of 5 U.S.C. § 7513(b)(2) *clearly constitutes harmful error* under 5 U.S.C. § 7701(c)(2)(A).

*Ratley v. Department of the Army*, 11 MSPB 564, 567 (1982) (citations and footnotes omitted) (emphasis added).

In its opinion in *Baracco*, the Board contradicted this specific language and concluded that the agency decision in *Ratley* was reversed, not because violation of section 7513(b)(2) rendered the decision "not in accordance with law," but rather because reduction of the reply pe-

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[28] Generally, an agency must follow its own precedent or explain its reasons for refusing to do so in a particular case. *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-54 (1954); *see Public Interest Research Group v. FCC*, 522 F.2d 1060, 1064 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

[29] *E.g., Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984); *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982); *Local 777 v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978). *See Atwell v. Merit Systems Protection Board*, 670 F.2d 272, 281-82 (D.C. Cir. 1981) (strict standard of review of Board construction of the CSRA).

riod substantially impaired Ratley's ability to defend himself, thus supporting a finding of harmful error. App. B at 89a. The Board's abrupt, unjustified departure from the course it established in *Ratley* renders its decision in the instant case arbitrary and capricious. Despite briefing and argument on this point, the court of appeals' terse affirmance did not even refer to the Board's abrupt reversal of its interpretation of the CSRA in *Ratley*. *Adams/Baracco*, App. A at 22a-23a n.3.

The court of appeals also affirmed without proper scrutiny the Board's unwarranted departure from its fundamental precedents on rational imposition of penalties. In the seminal, judicially-sanctioned case of *Douglas v. Veterans Administration*, 5 MSPB at 332-33,[30] the Board established the rule that, in reviewing an agency's imposition of a penalty, it must assure that the agency conscientiously considered the relevant factors and reached a responsible balance within the limits of reasonableness. If the Board finds that the agency failed to weigh the relevant mitigating and other factors *or* that the agency's judgment clearly exceeded the limits of reasonableness, the Board must specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *Id.* at 332.[31]

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[30] *See, e.g., Nagel v. Department of Health and Human Services*, 707 F.2d 1384, 1386 (Fed. Cir. 1983); *Parsons v. Department of the Air Force*, 707 F.2d 1406, 1409 (D.C. Cir. 1983).

[31] The Board stated that the relevant factors include the following:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> (3) the employee's past disciplinary record;

*Douglas* and its progeny require that, before an agency may impose a penalty on an employee, several relevant factors *must* be considered and weighed. Not only did the Board in *Schapansky* ignore relevant mitigation and consistency of the penalty factors, but it implicitly eliminated one of the two bases upon which *Douglas* established that an agency penalty may be reversed—*i.e.*, failure to consider all relevant factors. The Board addressed only the unreasonableness of the penalty as a ground for reversal.

Moreover, the nature and seriousness of the offense explanation the Board offered (which was endorsed by the court of appeals, *Schapansky*, App. A at 13a) for departing from the norm conflicts with previous Board decisions. In reviewing a removal of an employee for threatening an agency investigator with a loaded gun, the Board held that the seriousness of the offense *cannot*

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(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter;

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

*Id.* at 332 (footnote omitted).

justify ignoring all mitigating and other factors, even in cases where the conduct charged may constitute a felony—

> In his initial decision, the presiding official found that although the agency had not considered factors such as appellant's length of service and his past disciplinary record, these factors were not relevant in view of the "egregious" nature of appellant's conduct which warranted removal. We disagree. In *Douglas v. Veterans Administration*, MSPB Docket No. SF075299024 at 33-34 (April 10, 1981), we noted that not all of the factors which are generally recognized as relevant would be pertinent in every case. *However, the nature and seriousness of the offense is but one of the factors which should be considered and weighed in determining the reasonableness. Thus, although the nature of the offense may be so serious as to outweigh the other factors, it does not follow that the other factors can be ignored.* *Id.* at 33-34.

*Sisemoore v. Department of the Navy*, MSPB No. BN07528110207 (Oct. 28, 1982) (Slip op. at 2) (emphasis added).[32]

The court of appeals specifically approved the Board's ruling in the lead cases, contrary to Board precedent in *Douglas* and *Sisemoore*, that the serious nature of the offense justified disregarding other factors completely. *Schapansky*, App. A at 13a. Logically, however, it is

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[32] *See* cases reversing agency removals for failure to weigh mitigating factors: *Washington v. Tennessee Valley Authority*, 1 MSPB 525 (1981) (possession of firearm on agency property); *Davis v. Department of the Treasury*, 8 MSPB 17 (1981) (failure to pay income tax timely); *Grimm v. U.S. Postal Service*, 9 MSPB 491 (1982) (second offense of assault); *Grandison v. Department of the Navy*, 7 MSPB 194 (1981) ("serious" offense of assault). *See also* section 3, *supra*; *Yoshida v. Department of Navy*, MSPB No. SF07528010108 (Jan. 4, 1983) (upholding 15-day disorderly conduct suspension for throwing a wrench at a supervisor while shouting threatening remarks).

precisely in this one area where the court condoned ignoring other factors—where the most serious penalties are involved—that such factors as consistency of the penalty and mitigation are most important.

Here, for example, petitioner Roy L. Schapansky served as an Air Force fighter pilot, was a Korean War veteran, had 24 years of unblemished and honored service as an air traffic controller, and was eligible for retirement in six months when he was fired. *See* Schapansky Fed. Cir. App. at 110, 122-24, 138. He attempted to return to work on August 17, 1981, but was not permitted to do so. *Id.* at 138. The court of appeals and the Board erred in failing to require that the agency at least take these relevant factors into account in assessing the penalty (*see Douglas, supra* n.31).

The court of appeals' decision cannot be allowed to stand under this Court's test—

> we must "consider whether the *decision was based on a consideration of the relevant factors* and whether there has been a clear error of judgment." *Normally an agency rule would be arbitrary and capricious if if the agency has* relied on factors which Congress has not intended it to consider, [or] *entirely failed to consider an important aspect of the problem* . . . . The reviewing court should not attempt itself to make up for such deficiencies: "we may not supply a reasoned basis for the agency's action that the agency itself has not given."

*Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. at ——, 103 S.Ct. at 2866-67 (citations omitted) (emphasis added).

Furthermore, the Board's holding conflicts with the admitted fact that employees who participated in strikes against the FAA in 1970 and 1981 are now employed by the agency. *E.g.*, Schapansky Fed. Cir. App. at 121. *See Miller v. Bond*, 641 F.2d 997 (D.C. Cir. 1981); *Benson v. Dow*, 520 F. Supp. 231 (W.D. Pa. 1981). The Board held previously that—

> [W]here an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Douglas v. Veterans Administration*, 5 MSPB 313, 333-34 (1981).

*Woody v. General Services Administration*, 6 MSPB 410, 411 (1981).

In *Ramirez v. Department of the Air Force*, MSPB No. DA07528010067 (Dec. 2, 1982), the Board ruled that the presiding official wrongfully had placed the burden to establish disparate treatment on the appellant, when, properly, "the agency had the burden of proving legitimate reasons for the difference in treatment." *Id.* at 3, citing *Woody*. Here no such showing was made by the agency.

In *Capozella v. Federal Bureau of Investigation*, 10 MSPB 474 (1982), the Board held that a reduction in grade was proper rather than the removal imposed by the agency. The Board placed great weight on evidence that, while the appellant FBI agent was removed for wearing women's clothing on duty for misguided purposes, 12 other special agents who had engaged in serious misconduct varying from driving while intoxicated to assault were given more lenient punishment ranging from censure to a 30-day suspension. The behavior that the Board compared to Mr. Capozzella's offense described a far greater range of misconduct than any difference between the charges against petitioners and the conduct committed by the 1970 and 1981 returning strikers.

*Douglas* and its progeny are inconsistent with the Board's position here. As discussed in section 3, *supra*, the court of appeals made an unsupportable attempt to distinguish petitioners' case from the *Douglas* line of decisions—"Congress has determined that removal is *an* appropriate penalty for striking." *Schapansky*, App. A at 13a (emphasis added). *See* footnote 22, *supra*.

Despite the fact that petitioners presented these arguments in the lead cases, the court of appeals dismissed them with an inexplicable, terse statement in *Schapansky*, App. A at 15a, that "*amici's* strong assertion that the Board disregarded here its own approach to determination of the appropriateness of a penalty [citing *Douglas* and *Woody*], is unsupported in the record." What is unsupported is this bald assertion by the court. Nowhere in the record did the agency, the Board or the court analyze mitigating factors and disparate punishment as is required under applicable precedent.[33]

The court of appeals illogically constructed a blanket distinction between those strikers who, for example, unknowingly happened to return to work *on or before* what turned out to be their extended August 18th deadline shift (and who were not punished) and those who attempted to return *during or after* their August 5th deadline shift, but were turned away and dismissed.[34] The court's bright line distinction between those who "elected'" to return and those who "chose not to do so," *Schapansky*, App. A at 14a, ignored the fact that many of those fired *did* elect to return, with only bad luck separating

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[33] Even if it were generally true in other contexts that "[u]neveness in application of a penalty is not a ground for invalidating it," *Schapansky*, App. A at 14a, the Board in these cases erred by deviating unjustifiably from its own precedent requiring the agency to prove legitimate reasons for disparate punishment.

[34] *See, e.g., Benson v. Department of Transportation*, MSPB No. PH075281F1021 (Mar. 5, 1984) (slip op. at 7) ("confusion engendered by the President's statement and statements by agency officials"); Statement of the Case, *supra*; *compare Bader v. Federal Aviation Administration*, MSPB No. NY075281F206 (Nov. 4, 1982) (unappealed final presiding official decision) (reinstating 3 controllers who tried to return 6 hours after the start of their 8 a.m. August 6th deadline shift), *with Parsons v. Department of Transportation*, MSPB No. BN075281F0626 (Oct. 6, 1983) (upholding dismissal of controller who attempted to return 6 hours after the start of his 2 p.m., August 5th deadline shift), and *Bergh v. Department of Transportation*, MSPB No. SE075281F0401 (Sept. 30, 1983) (upholding dismissal of controller who tried to return on August 6th).

them from those who, equally ignorant as to their deadlines, happened to return in time.[35]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1984

[35] *Compare Mangano v. Department of Transportation*, MSPB No. NY075281F1058 (Oct. 3, 1983) (reversing removal of controller who did not attempt to return when he found out his leave had been cancelled—"[a]ppellant's contention that he thought it was too late to return to work after receipt of his notice is logical and further corroborated by appellant's testimony that another air traffic controller whom he specifically identified by name was not allowed to return to work because he reported one hour past his deadline shift.") (slip op. at 3), *with Benson v. Department of Transportation, supra* (reversing removal of controllers who were prematurely told by their supervisor that they had been hired, but affirming dismissal of controllers who relied upon the same information as relayed by the reinstated controllers) (*see* Devaney dissent).

84-258

No.

Office-Supreme Court, U.S.
FILED
AUG 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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ROY L. SCHAPANSKY, *et al.*,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Appeal No. 83-663

ROY L. SCHAPANSKY,
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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DECIDED: May 18, 1984

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Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from a decision of the Merit Systems Protection Board (Board), Docket Number DA075281F1130, sustaining the August 26, 1981, permanent removal of Roy L. Schapansky (Schapansky), by the Department of Transportation's Federal Aviation Administration (agency) from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas. We *affirm.*

### BACKGROUND

Removal was based on charges of participation in a strike against the United States from August 3 to August 5, 1981, absence without leave for the same period, and violation of the "loyalty and striking" provision of

5 U.S.C. § 7311.[1] Schapansky appealed to the Board's Dallas Regional Office, which sustained the removal on May 14, 1982. On timely petition for review, the full Board affirmed the presiding official's decision and sustained Schapansky's removal on October 28, 1982.

*Presiding Official*

The presiding official determined that the agency had established by a preponderance of the evidence: (1) that Schapansky was a member of the union, the Professional Air Traffic Controllers Organization (PATCO); (2) that he was aware of the strike by the members of PATCO; (3) that he intended to and did participate in that strike by refusing, in concert with others, to provide his services to his employer; (4) that the agency did not err in applying the statutory provision of 5 U.S.C. § 7513 (b)(1);[2] (5) that the agency was correct under

---

[1] "§ 7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia."

[2] Section 5 U.S.C. § 7513 provides, in pertinent part:

"§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this

§ 7513(b)(1) in disregarding the requirement for 30 day notice before deciding upon and effecting an adverse action because it had "reasonable cause to believe the employee ha[d] committed a crime" and because 18 U.S.C. § 1918[3] makes striking by federal employees a crime;

---

subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date."

[3] "§ 1918. Disloyalty and asserting the right to strike against the Government

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Govern-

(6) that once an agency invokes § 7311, removal of the employee is mandatory; and (7) that removal was required to promote efficiency of the service under § 7513(a).

*Board*

Before the Board, Schapansky reiterated his basic contention that no evidence supported a finding that he had participated in the strike. He conceded that he was absent without leave on August 3, 4, and 5, 1981, and that his absence was a protest against the same conditions that other PATCO members were protesting by withholding their services. Schapansky said other PATCO members were "thinking different", but he viewed his absence as a legal protest and PATCO's "lawyers would take care of it." The presiding official, in finding that Schapansky was aware of and intended to participate in the strike, cited Schapansky's own testimony that he voted "yes" when a "strike vote" was taken by PATCO members on August 2, 1981, and that the agency had informed him that the strike would be in violation of law. The Board found no basis on which to disagree with the presiding official's finding or assessment of the hearing testimony.

The Board noted that Schapansky in his petition for review neither challenged the presiding official's discrediting of his assertion that he was absent because of harassment and fear for his personal safety, nor asserted any other basis on which his absence might be determined to have been involuntary.

Schapansky challenged the agency's consideration of a photograph showing him among PATCO picketers, saying he is not shown as carrying a sign and that nothing

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ment of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

showed him among picketers on August 3 or 4. The Board said that voluntary withholding of services in concert with others, not physical presence on a picket line, constitutes the gravamen of the charge. Schapansky's challenge of the photograph was therefore found unavailing.

On the merits of the basic charges, the Board held that the agency had proved the charges, that Schapansky had not rebutted the evidence of his knowledge of the strike and of his intent to withhold his services along with other PATCO members, and that he had made no showing that his absence was due to any factor other than strike participation.

Objecting to the absence of a 30-day advance written notice, Schapansky argued that he had not been formally charged with or convicted of a crime and that the agency had not proved his intent to do anything illegal. The Board pointed out that it has not adopted criminal charges, convictions, or proof of illegal intent as prerequisites to a finding of "reasonable cause to believe" that a crime had been committed in support of a decision to disregard the notice provision. The Board went on to say that because § 1918 makes participation in a strike against the United States a felony punishable by up to one year and a day of imprisonment, and because Schapansky's conduct evidenced such participation, it would sustain the finding that the agency had reasonable cause to believe that a crime had been committed and that disregard of the notice requirement was thus permissible under § 7513(b)(1).

Reading § 7311(3) as mandating removal when a charge of striking is sustained, the Board rejected Schapansky's contention that removal was unreasonable. The Board further noted the self-evident gravity of Schapansky's offense in participating in a strike against the Government, that by its very nature such action disrupts the Government's performance of its mission, that it is

a criminal offense, that the position of air traffic controller is highly sensitive, the incumbent being directly responsible for the safety of passengers, and that that responsibility entails maintenance of the confidence of his employer and the public who rely on him. The Board viewed a controller's intentional and ongoing abdication of that responsibility, by participating in the strike and by continuing to strike despite the President's 48-hour grace period,[4] as constituting particularly egregious conduct which destroyed the controller's unique relationship of trust. The Board therefore held that the agency's removal penalty cannot be deemed excessive, disproportionate, or unreasonable.

Sustaining the finding that removal will promote the efficiency of the service, § 7513(a), the Board determined that § 7311 reflects the belief of Congress that removal of an employee for participation in a strike promotes that efficiency, and that there is a clear and direct relationship of such misconduct to the employee's satisfactory accomplishment of his duties and to the agency's ability to fulfill its mission.

*Issues*[5]

(1) Whether the Board correctly determined that the agency proved the charges by a preponderance of the evidence.

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[4] At approximately 11:00 a.m. E.D.T. on August 3, 1981, the President of the United States announced:

> This morning at 7:00 a.m. the union representing those who man America's air traffic facilities called a strike.—I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours, they have forfeited their jobs and will be terminated.

While more than 1,200 controllers heeded the President's call to return to work; approximately 11,500 continued to strike. 17 Weekly Comp. of Pres. Doc. 845 (August 3, 1981).

[5] Because this and nine other "lead" cases involving air controllers were argued before the same panel on the same day,

(2) Whether the penalty of removal was too harsh and unreasonable and should be mitigated.

(3) Whether the removal here was effected with harmful procedural error.

## OPINION

### (1) *The Charges*

In discussing the issues, the briefs of Schapanksy and *amici* cite the language of court opinions dealing with matters and questions totally divorced from those in a case dealing with the propriety of the government's action in removing those who strike against it. We join enthusiastically in the general desire for symmetry in law and procedure, and nothing here said is thought to make a fundamental difference in either (except perhaps for recognition that mitigation is irrelevant when striking is proved, *infra*). Nonetheless, the facts of this case, and the differences between them and those in other types of cases, are such as to render without purpose a discussion here of the many other types of cases cited in the briefs.

The Board properly held that though the agency could establish a *prima facie* case of striking by showing an employee's unauthorized absence during a strike of gen-

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counsel were permitted to present issues which may not have been presented to the Board in the particular case argued by counsel, but which had been presented to the Board in one or more of the lead cases.

Similarly, the court has taken judicial notice, at Schapansky's request, of the materials in his Supplemental Appendix, the Board having considered major segments of that appendix in another lead case.

Briefs *amicus curiae* were received from three sets of counsel collectively representing many hundreds of air controllers whose cases are described by *amici* as likely to be controlled by the outcome in this case. Issues and arguments presented by *amici* in this case are addressed here.

eral knowledge and his presence on the picket line, the latter element is not essential, and the charge of striking is proven when it is shown that the employee withheld his services in concert with others, regardless of whether the employee joined a picket line. *See United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.), *affirmed*, 404 U.S. 802 (1972). The Board did not, as *amici* assert, accept mere absence during a strike as proof of the charges. On the contrary, as appears below, it took into account all of the facts and circumstances. The Board's decision was not even remotely "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . ." 5 U.S.C. § 7703(c).

The record demonstrates unequivocally that the strike was well and widely known, that Schapansky knew it was illegal to strike against the government, that he knew FAA considered PATCO's "job action" an illegal strike, that his absence was unexplained, that he never attempted to contact the agency to advise it of any reason for his absence, and that under the circumstances his absence constituted evidence of participation in the strike. Proof of a wide-spread strike of general knowledge, together with proof of Schapansky's absence without authorization or explanation during the strike, must in the practical world constitute at least a *prima facie* case of his participation in the strike.

Once an agency has made a *prima facie* showing, the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing. The burden of proving the charge by preponderance of the evidence is and remains throughout upon the agency. The order of presentation, however, is allocated in such a way that each party is required to give evidence in the area in which it has the better access to information. It may be that little countering

evidence would be required, where, for example, the *prima facie* case was minimally supported. We need not discuss that relationship here, however, for the *prima facie* case here was more than minimally supported and Schapansky submitted no evidence effective to counter it.

The agency's burden of proof respecting strike participation may be described as a burden of "persuasion", because it has "in form the affirmative allegation" and must bear the burden of persuasion from start to finish. *See*, 9 J. Wigmore, *Wigmore on Evidence* 2486, 2489 (J. Chadbourn rev. ed. 1981).

Schapansky points to language in the Board's opinion in which it appeared to be placing a burden of persuasion on him. It is clear, however, from a reading of the challenged phrase in the context of the entire opinion that the Board in actuality placed a burden of production, not persuasion, on Schapansky following presentation of the agency's *prima facie* case. The Board specifically stated that it required the agency to "ultimately establish" the employee's participation in a strike. Thus the Board did not, as Schapansky asserts, craft some new approach for use in his case.

Absent effective rebuttal, the agency must be held to have carried its burden of persuasion. Schapansky concedes that the agency demonstrated existence of the strike and his absence during it without authorization or explanation. It is undisputed that Schapansky offered no evidence before the Board that his absence was due to other factors. Though that state of the record would have been sufficient, the Board noted additional evidence of Schapansky's strike participation (his "yes" vote on PATCO's strike, his presence on the picket line, and his admission that, simultaneously with his fellow union members who were withholding their services, he withheld his in what he called, after the fact, a "protest").

Schapansky's argument that the Board ignored the intent element involved in the striking charge is without

merit. Before us, Schapansky says his only offense was absence and that he visited the picket line only out of curiosity. The argument ignores the circumstances which give meaning to his conduct. The Board specifically noted that an intent to strike can be proved by circumstantial evidence. Circumstantial evidence can be more persuasive and conclusive than direct evidence. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325 (1960). The unrebutted *prima facie* case here constitutes such circumstantial evidence. An employee who did not intend to strike could, under the present circumstances, be expected to advise his employer of the true reasons for his absence at the earliest possible moment. If extraordinary circumstances (not here shown) prevented communication with his employer until the employee was mistakenly charged with strike participation, the employee could certainly be expected to explain his absence when (at the very latest) he responded to the agency's proposal to remove him. Schapansky's intent to withhold his services in concert with others is established on this record.

Schapansky is equally incorrect in asserting that proof of the charge requires proof of an employee's specific intent to implement an agreed plan. Neither participation in strike planning nor express agreement with others to perpetrate the strike is a necessary ingredient of proof that a particular employee participated in a strike. If a requirement for proof of intent resides in 5 U.S.C. § 7311, (and we need not and do not decide that question here) proof of general intent suffices. Unexplained absence during a strike of general knowledge establishes that the employee "intended" to strike. The law, like life, recognizes that one may not eat his cake (strike for benefits) and have it too (escape removal when the strike fails by merely denying intent).

In *Moylan* v. *Department of Transportation, FAA*,* No. 83-1150, also decided today, the *amicus curiae* ar-

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* This Appendix incorporates the changes to text made by the court in "ERRATUM" pages subsequently issued.

gues that the Board's theory of proof announced in the present case denied the controllers due process because it retroactively subjected them to a more onerous burden of proof than the Board previously had applied. The amicus' argument is that the Board's prior standard required proof of active involvement in the strike, such as picketing, to establish a *prima facie* case of striking, and that in Schapansky's case the Board eliminated that additional element of proof.

The *amicus*' argument rests upon an erroneous assumption. There was no earlier rule requiring proof of active involvement in the strike to establish strike participation. Although earlier cases in which strike participation was found involved picketing and other active strike involvement, the Board never held that such activities were an essential element of the proof of strike participation. The Board's decision in the present case did not change the standard of proof necessary to show strike participation, but merely clarified it. Moreover, although the *amicus* in Moylan argues that the Board's allegedly new standard of proof denied the controllers a fair opportunity to present evidence under that standard, the *amicus* points to no specific evidence that the controllers would have introduced if they had known that the Board would evaluate their cases under that standard. All of the controllers had a due process opportunity before the Board to introduce evidence that they had not participated in the strike, and many took that opportunity.

The charges of absence without leave and violation of 5 U.S.C. § 7311 are supported by the same evidence found to support the charge of striking.

The Board found that the agency proved by a preponderance of the evidence the charges forming the basis for Schapansky's removal. Applying the statutory standard applicable to our review, we hold the Board's decision supported by substantial evidence and not to have

been arbitrary, capricious or otherwise not in accordance with law.

(2) *The Penalty*

Sustaining the agency's determination that discharge was an appropriate penalty, the Board declined to rule on whether it had authority to mitigate it. In light of 5 U.S.C. § 7311, it held that dismissal "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking".

Determination of the appropriate penalty is a matter committed primarily and largely to the discretion of the employing agency. *Jones* v. *United States*, 617 F.2d 233, 236 (Ct. Cl. 1980). Only in the exceptional case, in which the penalty exceeds that permitted by statute or regulations or is so harsh that it amounts to an abuse of discretion, may its imposition be overturned. *Weston* v. *U.S. Department of Housing and Urban Development*, 724 F.2d 943, 949 (Fed. Cir. 1983). Whether the court would have chosen a different penalty, had it been making the initial choice, is in the normal case irrelevant. "[P]enalty decisions are judgment calls that should be left to the discretion of the employing agency." *Weiss* v. *Postal Service*, 700 F.2d 754, 758 (1st Cir. 1983). The penalty here was clearly not disproportionate to the offense.

Striking against the government is a grave offense and a violation of the solemn oath an employee signs, as did Schapansky, as a condition of his employment. Striking, moreover, is a criminal offense. *See Jones*, *supra*, 617 F.2d at 237. It disrupts the functioning of the government itself. In this case, the inescapable and thus intentional goals of Schapansky and his striking cohorts, absent prompt governmental capitulation, were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the pub-

lic safety. *PATCO* v. *Federal Labor Relations Authority*, 685 F.2d 547, 622 (D.C. Cir., 1982) (Mackinnon, J., *concurring*). Removal under such circumstances was clearly justified, and the nexus between removal and efficiency of the service is clear.

It is argued that removal of many striking controllers actually injured the air traffic system, which was forced to rely on supervisors and new, rapidly trained controllers. The argument is inappropriate here. Whether the long range efficiency of the service is better served by capitulation, with its risk of encouraging future strikes, or by a temporary reduction in service while new controllers are trained, is solely a policy choice reserved to the executive branch.

Nothing of record supports Schapansky's assertions that the permanent removal penalty should have been mitigated and that mitigation considerations applicable to other types of charges must be applied here. Schapansky cites the length and quality of his past service. However, the gravity and effects of Schapansky's offense are so great, and the statutes relating to strikes against the United States are so unequivocal, that they do not merely limit the extent of appropriate mitigation; they render mitigation irrelevant. Congress has determined that removal is an appropriate penalty for striking against the government. It is therefore not necessary, as *amici* contend, to remand for a more complete record respecting mitigation factors. An individual with the longest and finest record may be removed when found to have irrevocably sullied that record by participating in the strike at bar against the United States. Long and excellent service creates no license to violate a criminal statute against striking, and to violate one's oath taken on the day of employment that one would not strike. Congress cannot be held to have acted unconstitutionally in enabling the United States to refrain from continuing

to employ one who strikes against the federal government; nor can that enablement be impeded by mitigating factors that may be applicable to lesser offenses and different circumstances.

Lastly with respect to the penalty, Schapansky has not shown that his removal should be considered in light of the government's failure to remove those who returned to work during the Presidential grace period or "moratorium." Unevenness in application of a penalty is not a ground for invalidating it, *Jones, supra*, 617 F.2d at 238, *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 187, 188 (1973). Moreover, the argument relating to returnees does not involve unevenness. Those who returned occupy a status entirely different from that of those who did not. Schapansky could have availed himself of the opportunity (as 1,200 air controllers did), but chose not to do so. The President having established a grace period, no reason exists for considering those who elected to accept the presidential invitation as though they were in the same category with those who disdained it.

Similarly, also, *amici's* reliance on the allegedly less harsh response of the government to earlier and different controller actions (a call-in-sick and a slowdown) which *amici* say the agency considered to have been strikes, is irrelevant. That other government workers have struck and been allowed to return to work, *see Miller* v. *Bond*, 641 F.2d 997 (D.C. Cir. 1981) and *Benson* v. *Dow*, 520 F. Supp. 231 (W.D. Pa. 1981), or that a court may have viewed it permissible under some circumstances to continue government strikers in employment, *see U.S.* v. *PATCO*, 653 F.2d 1134 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981), cannot be viewed as forever binding the government against the removal of any striker under any circumstances. Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided. Removal is permissible under those statutes and

no statute prohibits removal of any who strike against the United States. Beyond differing circumstances surrounding earlier events, nothing in the law requires that its enforcement with less than full vigor in the face of one violation of the law binds the government against full and fair enforcement in the face of a later and distinct violation of that law. Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated. Whether those involved in earlier events were similarly situated is not here determinable. What is clear is that mercy and compassion, if such were shown in response to earlier and differing infractions, should not be forged into handcuffs restricting the government's response to the present strike of air controllers in 1981.

Similarly, *amici*'s strong assertion that the Board disregarded here its own approach to determination of the appropriateness of a penalty, *see Douglas* v. *Veterans Administration*, 5 MSPB 313 (1981) and *Woody* v. *General Services Administration*, MSPB Docket No. SF07528110028 (June 2, 1981) is unsupported in the record. That the penalty includes a barrier to reemployment as a controller is not unreasonable in view of the statute, 5 U.S.C. § 7311 ("may not accept or hold a position"), and does not require Schapansky's reinstatement as a controller.

We hold that the penalty here was not arbitrary, capricious, or otherwise not in accordance with law.

(3) *Procedures*

Schapansky says that because his unauthorized and unexplained absence during the strike did not constitute a "reasonable cause to believe" he had committed a crime, his discharge with less than thirty days notice was procedurally defective.

Section 7513(b) makes the normal 30 days' notice unnecessary when the agency has "reasonable cause to be-

lieve the employee has committed a crime for which a sentence of imprisonment may be imposed." As above indicated, 18 U.S.C. § 1918 makes participation in a strike against the government such a crime. Schapansky's unexplained absence during a well known strike established reasonable basis for the agency to believe that he was engaged in such participation and thereby automatically established a reasonable basis for its belief that he had committed the crime of striking against the government. That a second charge, absence without leave, does not relate to a crime is irrelevant. An agency is not required to wait 30 days to respond to an employee's misconduct when that misconduct is reasonably believed to constitute a crime.

Though Schapansky complains of the lack of 30-day notice, he makes no attempt to demonstrate that the shortened time of notice was harmful. The Civil Service Reform Act specifies that only harmful procedural errors may vitiate an agency action. 5 U.S.C. § 7701(c)(2)(A) (Supp. II 1978). To be harmful the error must substantially impair the employee's rights. *Shaw* v. *Postal Service*, 697 F.2d 1078 (Fed. Cir. 1983); *Brewer* v. *Postal Service*, 647 F.2d 1093 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982). Nothing of record would indicate that if the shortened time of notice were error (and as above indicated it was not), it impaired Schapansky's rights in any manner.

Schapansky argues that the President's August 3, 1981 announcement was a final decision to discharge him and that the agency's removal proposal did not afford him a meaningful opportunity to reply. *Amici* argue that Schapansky should have been given the right to reply to the President and to demand that the President state his reasons for his action. The argument is without merit.

The President's anouncement said those who returned would retain, and those who continued to strike would forfeit, their positions. Some 1200 controllers returned.

Having elected to continue on strike, Schapansky could hardly have been surprised when the promised removal notice arrived. There was, contrary to Schapansky's argument, no discharge of Schapansky or of anyone else on August 3, 1981. After August 5, 1981, the agency carefully gave Schapansky all possible opportunities to reply under an entire panoply of rules, procedures, and regulations. Indeed, Schapansky filed three written responses and responded orally. Nothing whatever of record supports Schapansky's implication that he would not have been retained if he had shown a basis for his absence other than participation in the strike.

The President in no manner usurped the authority and responsibility of agency officials to determine whether each individual had continued to engage in the strike after the August 5, 1981 deadline. In view of the need to continue a safe air transportation system for the public, the President's dispensation was, as has been well described, a "grace" period that "worked" insofar as it enabled 1200 controllers to return promptly to maintenance of that system. One who commits a crime by striking against the government can be seen to have done so from the first moment he withholds his services in concert with others. Schapansky, along with all other striking air controllers, was in this case given a chance to rethink for two days and thereafter was given a full and complete due process opportunity to show that he had not in fact struck against the United States. The President bears a constitutional duty to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, cl. 4. His action here was directly within his official responsibility, not merely within its "outer perimeter" as was found permissible in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The President acted here in a manner obviously calculated to balance the public interest in a continuation of air transportation, immediate enforcement of the law, and an opportunity for violators to re-

consider. An argument that the President's grace period somehow denied due process comes with poor grace from one who ignored it.

Schapansky cites decisions in contempt actions against PATCO and individuals for noncompliance with court orders to return to work: *Professional Air Traffic Controllers Organization, Air Transport Association of America* v. *Professional Air Traffic Controllers Organization*, 699 F.2d 539 (D.C. Cir. 1983); *PATCO* v. *Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982); *United States* v. *Phillips*, 525 F. Supp. 1, 8 n.6 (N.D. Ill. 1981); *United States* v. *PATCO*, 525 F. Supp. 820, 822 (E.D. Mich. 1981); *United States* v. *Haggerty*, 528 F. Supp. 1286, 1296 (D. Colo. 1981) and language in opinions accompanying those decisions indicating that return to work was not possible after failure to meet the President's deadline. The citations are irrelevant here. That Schapansky lacked after his deadline a unilateral authority to simply return to work at will, and could not therefore be held in contempt of a return to work order, bears no relation to whether the procedures applied to his removal were proper. That those procedures were guided from agency headquarters, and spelled out that controllers would be removed *if* it were *proven* that they participated in the strike, speaks for, not against, an exercise of care for employee rights under difficult and unusual circumstances.

*Amici* assert that the agency's procedures giving Schapansky an opportunity to explain his absence were a "sham" because the agency was "forced" by the President's announcement to fire him. At the same time, *amici* complain that there was disparate treatment because some controllers, having apparently made adequate explanations (described by *Amici* as "settlements"), were not discharged. *Amici* further say: the President's moratorium was an improper exercise of his power to pardon (U.S. Constitution, art. II, § 2 cl. 2); the agency had no

power to extend the President's return to work deadline to the first scheduled shift following that deadline; and that the agency failed to notify Schapansky that he would not be removed if he met his next scheduled shift. All of those arguments have been fully considered and found without merit. Lastly, *amici's* assertions concerning the suffering of controllers' families invoke our sympathy; they cannot under the law invoke a reversal.

There is no basis whatever for Schapansky's claim that it was improper for the government to adopt a uniform policy of removing each employee whose participation in the illegal strike was proven, or that that policy denied Schapansky a full and meaningful opportunity to reply. Schapansky has not in the slightest demonstrated that any agency officials were unreceptive to evidence that the facts supporting the charge were not as alleged, and, as above indicated, mitigation is not an issue. The Court of Claims has rejected the argument that an agency's predetermination to remove an employee if the charges against him were proven is improper. *Pascal* v. *United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976). The court there noted that the "crucial point is that the plaintiff has failed to demonstrate that the [agency] would have been impervious if the proof failed to show that the facts were as charged." *Id.*

We hold that the agency's procedures were in accordance with law and that their application involved no harmful error.

DECISION

Accordingly, the Board's decision sustaining the August 26, 1981 permanent removal of Schapansky by the agency from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas, is affirmed.

*AFFIRMED*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Appeal No. 83-1155

RICHARD T. ADAMS, *et al.*,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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Appeal No. 83-1156

GARY S. BARACCO,*
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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DECIDED: May 18, 1984

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Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeals from decisions of the Merit Systems Protection Board (Board), Docket Numbers NY 075281F0424,

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* Under Rule 43, Federal Rule of Appellate Procedure, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion.

DC 075281F0895, sustaining the August 1981 removal of Richard T. Adams, Gary S. Baracco, and others (Adams) by the Department of Transportation's Federal Aviation Administration (agency) from their positions as Air Traffic Control Specialists. The bases for removal constituted proven charges of striking against the United States and absence without leave. We *affirm.*

*Background*

The reader of this opinion is referred to this court's opinion accompanying its decision in *Schapansky* v. *Department of Transportation, FAA*, No. 83-663, (Fed. Cir. May 18, 1984) issued of even date. The discussion in *Schapansky* of facts and issues common to that case and this are adopted and incorporated in this opinion.

Except for instances in which a petitioner is identified by name, "Adams" should be read as applicable to all petitioners in these present appeals.[1]

Issues raised by Adams and *Amici* and differing in substance or detail from those discussed in *Schapanksy* are discussed in this opinion.

Unlike Schapansky, petitioners here made no oral response to the notice of removal and were not shown to have voted for the strike. Only Baracco was shown to have engaged in picketing. Each present petitioner received an agency letter proposing removal for strike participation and absence without leave. Each responded only by submitted union (PATCO) prepared forms requesting time enlargements and production of documents. No petitioner denied the charges.[2] No petitioner re-

[1] Listed in Appendix A are petitioners whose appeals are hereby decided under Appeal No. 83-1155.

[2] Adams' assertion that a sentence in one stock PATCO response (challenging any basis for a charge of committing a crime) was a denial of the charges is creative, but unavailing. The sentence was directed at the agency's use of a shortened notice period.

quested opportunity for oral response, beyond the requests for extension of time to answer "in writing and orally". Nor did any petitioner testify before either the agency or the Board. Other fact differences will appear in the course of discussion on the issues.

*Issues*

(1) Whether government officials created such confusion concerning the Presidential deadline and controller's ability to return to duty as to have prevented formation of an intent to strike.

(2) Whether the Board properly drew an adverse inference from petitioners' failure to testify.

(3) Whether the agency unlawfully suspended petitioners during agency proceedings by placing them in a non-duty, non-pay status without following the procedures of 5 U.S.C. § 7513.

(4) Whether the Board correctly found that the strike lasted at least through August 19, 1981.[3]

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[3] *Amici* want the removals vacated for lack of a 30 day notice, asserting: (1) notice was sent before petitioners were found striking; and (2) 18 U.S.C. § 1918, (making strikes a crime) violates the Thirteenth Amendment. Argument (1) is unfounded. 5 U.S.C. § 7513(b) requires only a "reasonable cause to believe" an employee has committed a crime. Argument (2), impressively stated, attempts too much. Nothing in § 1918 compels anyone to work against his or her will. It neither prohibits nor impedes resignations.

Adams, Baracco, and *Amici* say the removal notice provided for reply "within 7 calendar days," thus providing effectively for 6 days, in violation of 5 U.S.C. § 7513(b)(2) (reply in "not less than 7 days"). The argument is semantic and senseless on this record. The Board held the notice itself inclusive of 7 days, though it found harmless error in a letter danying time enlargement to Baracco. Each petitioner responded to the notice within 7 days. In requesting time enlargements, petitioners said they did not think "seven days is a reasonable time". If there were error, it was harmless, no request for an oral reply time having been made

## OPINION

### (1) *Alleged Confusion*

Adams' brief contends that the President's announcement and agency actions respecting controllers' ability to avoid removal by returning to work were so confusing that controllers were unable to form an intent to strike. Petitioners have not told the agency, the Board, or this court what their intent was in absenting themselves from work throughout the time of the strike. Nor have they pointed to any evidence upon which anything but an intent to strike may be found, or which might counter the circumstantial evidence establishing an intent to strike.

The President announced at 11:00 a.m., E.D.T., on August 3, 1981, that controllers then striking who did not report for duty within 48 hours would forfeit their positions and "will be" terminated. Because of differences in shift schedules and time zones, the agency allowed controllers to return to work at the time of regularly-scheduled shifts that began after 11:00 a.m., on August 5, 1981.

The briefs say controllers thought they had been fired when they did not report to work before 11:00 a.m. on August 5, 1981, and thus "could not" take advantage of the permission to return at the time of their first regularly-scheduled shift following that ending of the President's grace period. The argument is disingenuous. First, the President's announcement terminated no one, least of all nonstrikers. Second, petitioners' briefs do not explain why they did not, as did 1200 other controllers,

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within the seven day period. The burden to show harm is petitioners', 5 CFR § 1201.56(b)(1), *Shaw* v. *Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983); yet no effort was made to show that any additional reply was or would have been attempted on the seventh day. The argument might be appropriate if the agency had refused to consider a reply filed on the seventh day because not filed "within 7 calendar days." This court does not sit, however, to decide hypotheticals.

report *before* 11:00 a.m. on August 5, 1981, or why they did not notify the agency at any time before their next scheduled shifts that they were not on strike, or why they did not simply report and announce their readiness to work at the time of their scheduled shifts, *if* they had no intention of striking at any of those times.

None of the present petitioners testified that he was confused. Nor is there any evidence whatever that any controller was confused.[4] Apparently recognizing the impossibility of an agency's proving what was in an employee's mind, Adams' brief concedes that intent can be shown by circumstantial evidence. It makes no effort, however, to blunt the thrust of the view that a controller absent at commencement of the strike, but truly not intending to participate in it, would, promptly upon hearing or hearing of the President's announcement, contact the agency and relieve it of any presumption that his absence was in any manner related to the strike. Petitioners alone knew their true intent.

Nor is there a logical, common sense basis for believing that the President's announcement envisaged an actual, simultaneous "return to work" of 15,000 controllers, or for believing that all non-reporting controllers had been "fired" as of August 5. If any such belief existed, the notice petitioners received of a proposal to remove them and of their opportunity to reply should have disabused them of it. That one having *no* intent to strike would so cavalierly accept the loss of one's job as of August 5, or would fail to inquire, or would fail to report or return before 11:00 a.m. on August 5, 1981, or would fail to report for work at the next scheduled shift, or would fail to explain his absence at the agency proceeding or before the board, simply defies rationality.

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[4] The assertion that petitioner Miller did not understand the charges is directly refuted in Miller's letter, the only evidence cited in the briefs as indicating that at least one petitioner was confused.

The citations of criminal cases, in which proof must meet a beyond-a-reasonable-doubt standard and in which mere proof of absence was found consistent with resignation, *e.g.*, *United States* v. *McCubbin*, Nos. 81-2059 through 2063 (10th Cir., Aug. 22, 1983); *United States* v. *Martinez*, 686 F.2d 334 (5th Cir. 1982), are inapt.

Petitioners' argument that the agency had a burden to notify each controller individually that he or she had until the specific time of that controller's next scheduled shift in which to take advantage of the President's grace period is without merit. Each petitioner knew when his next regularly-scheduled shift commenced and elected not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium. There is nothing whatever of record to indicate that any petitioner would have returned or had any interest whatever in returning to work at the time of his next regularly scheduled shift. Nor is there any evidence whatever to indicate that every returning petitioner would have been turned aside. Indeed, the evidence is to the contrary.

*Ad hoc* speculations of lawyers cannot substitute for evidence of what actually occurred. Though the court has in the rare circumstances of these cases permitted counsel substantial leeway in argument, there must be evidence in the record somewhere in these cases to support counsel's arguments, for this court's decision must be based on a "review [of] the record". 5 U.S.C. § 7703(c).

The argument that confusion prevented formation of an intent to strike is at best unpersuasive.

(2) *The Adverse Inference*

Once the agency had presented evidence of strike participation, it was not improper to draw an adverse in-

ference from petitioners' refusal to testify or otherwise offer rebuttal evidence before the Board.

Adams concedes the propriety of adverse inferences in civil cases when a party is silent in the face of probative adverse evidence. *See Baxter* v. *Palmigiano*, 425 U.S. 308, 318-19 (1976); *Book* v. *Postal Service*, 675 F.2d 158 (8th Cir. 1982). The briefs say failure to deny the charges is irrelevant because the agency had not presented sufficient adverse evidence. The argument is meritless. The agency had presented before the Board a *prima facie* case of strike participation fully adequate to support the charges in the absence of countervailing rebuttal.

Attacking the presiding official's decision, Adams' brief says failure to rebut the agency's allegations was in that decision considered part of the *prima facie* case itself. Petitioners declined twice, however, to explain their absences, once during the agency removal proceedings and again during the Board hearing. The first failure to deny the charges left those absences unauthorized and unexplained, thereby adding to the sufficiency of the agency's *prima facie* case. It is the Board's decision we review, and petitioners' silence before the Board, after the agency had established a *prima facie* case, fully warranted the Board's drawing of an adverse inference. "Silence is often evidence of the most persuasive character". *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153-54 (1923).

The judicial process is not entirely divorced from common sense and the everyday experiences of humankind. Petitioners had every reason and incentive to strenuously deny the charge of strike participation *if* they were not in truth strikers. But fear of prosecution for perjury, one may devoutly hope, has not entirely disappeared. The law and experience teach that a striker can be expected to refrain from falsely testifying under oath that his absence was due to non-strike reasons.

No error occurred in the Board's drawing of an adverse inference in this case.

(3) *Suspension*

Petitioners argue that they should be given back pay because they were constructively suspended during the period between the notice proposing removal and the date of removal.

Petitioners say that *if* they had reported for duty after failing to report after their deadlines, they would not have been permitted to work. Hence, say petitioners, reporting would have been a futile act, and that failure to place them in a non-duty-with-pay status was a constructive suspension. The Board, however, correctly held as a matter of law that petitioners had to show that they were ready, willing, and able to work after their receipt of notice. No such evidence was offered by these petitioners.

When petitioners failed to report to work as scheduled, they were considered absent without leave and were not paid. Like most federal employees, petitioners were not paid for unworked time, unless that time was scheduled as paid leave. Petitioners nonetheless claim entitlement to pay during a time when, through their own volition, they were absent from work without authorization, and during which they gave the agency no reason to believe they wanted to come to work. Choosing to absent themselves, petitioners created a situation in which the agency could not pay them, and at least an ambiguity in their pay status clarifiable only by action on their part. The view that one need not perform a knowingly futile act may be applicable to strikes in the private sector and to employer-created ambiguities. It is clearly inapplicable here. To order that petitioners be paid under the present circumstances is impermissible in view of long-standing federal pay policy and the necessity of distinguishing be-

tween those controllers who chose to report for duty between the receipt of notice and the date of removal and those controllers who, like petitioners, did not.

Petitioners, moreover, bear the burden of establishing the Board's jurisdiction, *Stern* v. *Department of the Army*, 699 F.2d 1312 (Fed. Cir.), *cert. denied*, 103 S.Ct. 3095 (1983), and their failure to establish that they were ready, willing, and able to work during the involved period constitutes a failure to carry that burden. Procedures under 5 U.S.C. § 7513 are inapplicabe to "voluntary actions initiated by the employee". 5 CFR § 752.401(c)(3) (1981). *See Taylor* v. *United States*, 591 F.2d 688 (Ct. Cl. 1979). Non-duty status here was voluntary. It was not agency-enforced or agency-initiated disciplinary action. There was no suspension, constructive or otherwise. *See Armand* v. *United States*, 136 Ct. Cl. 339 (1956).

The argument based on a constructive suspension theory must fail.

(4) *The Strike Period*

Petitioner Giannattasio was not required to report for work until 11 a.m., August 12, 1981, apparently because he was on annual leave until that time. When he failed to report, he was served with a notice of proposed removal dated August 12, 1981, charging him with striking as of that date. Giannattasio contended before the Board that the agency had not proved the strike was still in progress on August 12. The Board rejected that assertion, finding that the strike continued at least through August 19, 1981.

It has been said that the agency must prove: (1) that a strike was in progress on the date striking is charged; and (2) that the employee could have returned to work on that date. *Ketcham* v. *Federal Aviation Administration*, 82 FMSR ¶ 7026 (May 28, 1982).

The unrebutted evidence in the present case shows conclusively that the New York Center air traffic controllers were not fired at 11 a.m. on August 5, 1981, and were not locked out at that time. Giannattasio concedes that the agency interpreted the President's August 3, 1981 announcement as permitting air traffic controllers to return to work at the time of their first assigned shift beginning after 11 a.m., on August 5, 1981.

There is no evidence in this record that if Giannattasio had attempted to return to work at 7 a.m. on August 12 he would not have been allowed to do so. Indeed, the evidence is to the contrary. As the Board noted, the chief of the New York Center "testified that each of the appellants would have been permitted to return to work prior to the deadline shift with which they were charged with striking." Nor is there any evidence that Giannattasio was removed before August 28, 1981, after he had received the notice of proposed termination and filed a written reply thereto.

The only remaining issue is whether substantial evidence supports the Board's findings that the strike still continued on August 12, 1981, and that Giannattasio's failure to report on that date constituted participation in the strike. There is no doubt that a strike began on August 3, 1981. That strike continued until some event ended it.

There is no evidence that the union terminated the strike before August 12, 1981. Substantial absences continued at the New York Center well into September, as did picketing with signs stating "PATCO LOCAL 201 ON STRIKE" and numerous statements by union officials that the strike of Local 201 was continuing. Neither did the government end the strike before that date by terminating the employment relationship between itself and the controllers. Although the government had begun procedures to remove the controllers by August 12, Giannat-

tasio and many of his fellow controllers were still employees on that date.

Giannattasio relies on pronouncements and press statements of various government officials indicating that the strike ended before August 12, 1981, and on statements in court opinions indicating that the strike ended before August 19, 1981. *See United States* v. *Haggerty*, 528 F. Supp. 1286 (D. Col. 1981).

The government cites other authority in support of the Board's finding that the strike continued substantially beyond August 5, 1981. *See United States* v. *Taylor*, 693 F.2d 919 (9th Cir. 1982) (air traffic controller convicted of participating in the PATCO strike on August 8, 1981); *PATCO* v. *F.L.R.A.*, 685 F.2d 547 (D.C. Cir. 1982) (holding that strike lasted until November 1981); *United States* v. *PATCO*, 527 F. Supp. 1344 (N.D. Ill. 1981) (preliminary injunction on November 11, 1981, restricting place and manner of picketing by striking air traffic controllers); *PATCO* v. *Federal Aviation Administration*, 7 F.L.R.A. No. 10 (Nov. 3, 1981) (supplemental opinion of Chairman noting PATCO had neither disavowed nor attempted to end the strike as of November 3, 1981).

The evidence upon which Giannattasio relies does not undermine the Board's findings that the strike continued until at least August 19, 1981. However government officials may have viewed the strike, the objective facts outlined above support the Board's findings.

We hold that substantial evidence supports the Board's finding that the strike continued at the New York Center at least until August 19, 1981. Our review function thereupon ends.

Petitioners having made no attempt to rebut the foregoing evidence before the Board, Adams' brief suggests before us that the sign-carrying picketers may not have been striking controllers, but "just members of the public

merely exercising their first amendment rights." The argument is imaginative but without merit in light of all the evidence.[5]

(5) *Other Petitioners*

Listed in Appendix B to this opinion are other petitioners whose appeals were consolidated for decisional purposes before the Board in *MSPB Docket No. NY075281F0424* and who filed individual appeals under the numbers listed. The issues in those appeals appear to have been considered and decided in this or another of the decisions handed down by the court today. Petitioners listed in Appendix B shall notify the court within 14 days of the date of this opinion regarding their intent to withdraw or further prosecute their appeals. Absent notification within that period, the appeals listed in Appendix B will be dismissed. *See Asberry* v. *Postal Service*, 692 F.2d 1378, 215 USPQ 921 (Fed. Cir. 1982).

DECISION

Accordingly, the Board's decisions sustaining the removal of petitioners in Appeal Nos. 83-1155 and 83-1156 are *affirmed.*

*AFFIRMED*

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[5] An *amicus* in appeal No. 83-1156 chastises the Board for taking "official notice" that a nationwide strike continued through August 6, 1981. The issue does not appear to have been raised before the Board in any of the "lead" cases, by way of petition for reconsideration or otherwise. Because, also, the agency proved Baracco was on strike through August 7, 1981, because Baracco made no effort to refute the facts noticed, *see Ohio Bell Telephone Co.* v. *Public Utility Commission of Ohio*, 301 U.S. 292 (1937), and because the Board did not deny petitioners their due process right to establish the nonexistence of a strike at their location or their nonparticipation as strikers, the issue is inappropriately argued here.

Appendix A

| Petitioner | MSPB Docket No. | Court Docket No. |
|---|---|---|
| Richard T. Adams | NY075281F0424) | |
| Richard J. Bender | NY075281F0435) | |
| Richard Bronleben | NY075281F0454) | |
| Antonio Chevalier | NY075281F0477) | 83-1155 |
| Thomas R. Connelly | NY075281F0486) | |
| Thomas J. Contegni | NY075281F0488) | |
| Gerard Curran | NY075281F0500) | |
| James N. Fry | NY075281F0548) | |
| Allen Giannatasio | NY075281F0556) | |

Appendix B

| Petitioner | MSPB Docket No. | Court Docket No. |
|---|---|---|
| Raymond Miller | NY075281F0671 | 83-1159 |
| Edward Rocks | NY075281F0748 | 83-1160 |
| William Amodeo | NY075281F0430 | 83-1162 |
| Robert Biancamano | NY075281F0439 | 83-1163 |
| Bruce Bonacum | NY075281F0442 | 83-1164 |
| John Brunner | NY075281F0457 | 83-1165 |
| Richard Burns | NY075281F0460 | 83-1166 |
| Kenneth Carlstrom | NY075281F0469 | 83-1167 |
| William Cecil | NY075281F0473 | 83-1168 |
| Charles Contegni | NY075281F0487 | 83-1169 |
| Charles Darcy | NY075281F0507 | 83-1170 |
| Wayne Ennis | NY075281F0531 | 83-1171 |
| James Finnegan | NY075281F0538 | 83-1172 |
| Gary Dawson | NY075281F0509 | 83-1176 |

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Appeal No. 83-1155

RICHARD T. ADAMS, *et al.*,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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Appeal No. 83-1156

GARY S. BARACCO,*
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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NIES, *Circuit Judge*, concurring.

I join in the majority opinion and write only because I see a need for treatment of the issue of harmful error to a greater extent than it has been given in note 3 of the majority opinion.

The *Baracco* appeal is the lead case on interpretation of the harmless error provision found in 5 U.S.C. § 7701 (c)(2)(A) vis-a-vis the statutorily mandated time pe-

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* Under Rule 43, Federal Rules of Appellate Procedure, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion.

riod for reply to the notice of proposed removal. Baracco asserts that he was given only 6 days to reply, but for reasons not discussed in the majority opinion or pertinent to other controllers.

Baracco was sent the same notice as other controllers. Thus, under the majority decision here, he was initially given a 7-day notice period. The notice was mailed August 7 by regular mail with a duplicate sent the same day by certified mail. Since Baracco did not testify, we do not know when he received the notice by regular mail which, if before receipt of the certified mail, would have started the running of the reply period. In any event, he signed for the certified mail on August 11. In an undated letter from Baracco to the agency received August 14, he requested an extension of time to file written reply on the ground that "seven days" was not a reasonable time for filing a response. At that time he knew he had 7 days, as the MSPB found. In reply, the agency denied "an extension of time to submit a written reply beyond the seven day period." Had the agency letter stopped there, Baracco would have no basis for argument that he is in a different situation from others. However, in the same letter, the agency stated that the written response was to be submitted "prior to August 18, 1981, the expiration of the seven day notice period."

Treating this as arguably creating an ambiguity as to the final date for reply, the presiding official ruled that Baracco would have had to show, in any event, that a 6-day reply period was harmful error, that is, that the error might have affected the outcome of the case. Since Baracco had made a written reply within 7 days and offered no evidence at any time of individual circumstances which might have changed the outcome, the presiding official ruled that Baracco failed to show harmful error. The board agreed that Baracco was required to show that the asserted procedural error was harmful.

Baracco's position is that harmful error should not have entered into resolution of the issue of the shortened notice period. Baracco maintains that his right to a minimum 7-day reply period, unquestionably required by 5 U.S.C. § 7513(b)(2), rendered the action "not in accordance with law" within the meaning of 5 U.S.C. § 7701(c)(2)(C), set out below, and that, therefore, reversal is required. In essence, Baracco argues that a statutory procedural requirement is not subject to the harmful error provision of 5 U.S.C. § 7701(c)(2)(A). Stated another way, violation of a statutory procedural requirement is harmful *per se*.

The statutory provisions under consideration here read in pertinent part:

> 7701(c)(2) [T]he agency's decision may not be sustained . . . if the employee . . .—
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision.
>
> * * * *
>
> (C) shows that the decision was not in accordance with law.

The MSPB carefully reviewed the statutory history of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (Reform Act) to discern the relationship of these two provisions and found no clear guide to their interpretation. However, it found direction, in favor of the presiding official's ruling, in the numerous expressions of concern during hearings on the Reform Act about unnecessary procedural reversals of agency actions.[1]

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[1] *See Hearings Before the Senate Committee on Governmental Affairs on S. 2640, S. 2707 and S. 2830*, 95th Cong., 2d Sess. 22, 43, 101, 146 (1978); *Hearings Before the House Committee on Post Office and Civil Service on H.R. 11280*, 95th Cong., 2d Sess. 31, 122-23 (1978).

In rejecting Baracco's argument, the board also found guidance in the need to give effect to all parts of the statute. The board reasoned that procedural regulations have the force of law and that, if the harmful error provision could not be applied in connection with procedures established by statute, by the same token, it could not be applied to procedures established by regulations which have the force of law. Therefore, the statutory provision on harmful error would be meaningless.

The board then reviewed and reconciled its own decisions with its holding here, and, finally, found support for its interpretation in precedent of this court, particularly, *Doyle* v. *Veterans Administration*, 667 F.2d 70, 72 (Ct. Cl. 1981); *Brewer* v. *U.S. Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982) and *Shaw* v. *U.S. Postal Service*, 697 F.2d 1078 (Fed. Cir. 1983). For example, as stated by Senior Judge Cowen in *Brewer*, the first case reviewed by the Court of Claims under the Reform Act:

> In enacting the Civil Service Reform Act of 1978, Congress declared that this court should reverse agency actions for procedural error "only if the procedures followed substantially impaired the rights of the employees." S.Rep. No. 969, 95th Cong., 2d Sess. 64, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 2786.

647 F.2d at 1097.

In support of the contrary position, petitioner cites cases, for example *Ryder* v. *United States*, 585 F.2d 482 (Ct. Cl. 1978) and *Washington* v. *United States*, 147 F.Supp. 284, (Ct. Cl.) *cert. denied*, 355 U.S. 801 (1957), which are clearly no longer controlling in view of the addition to the statute of the harmful error provision.

Turning again to the precise language of the statute, I conclude that paragraphs (A) and (C) are directed at different evils. Harmful error in procedures (paragraph

A) raises the question: Did the wrongful procedure harm the employee in the presentation of his defense so that a different result might have been reached? Petitioner here has not asserted such harm. He asks simply for a *per se* rule. That is not a "showing" of harm as the statute requires. Paragraph (C), on the other hand, is directed *to the decision* itself. Was the decision in its entirety in accordance with law? Since the harmful error rule is part of the law, the question becomes: Is the decision in accordance with the law including the harmful error provision? Tested against this standard, the *Baracco* decision cannot be reversed since no harmful error has been shown.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Appeal No. 83-1154

LAWRENCE G. MARTEL,
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

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DECIDED: May 18, 1984

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Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

SMITH, *Circuit Judge.*

Petitioner Lawrence G. Martel (Martel) appeals from a decision of the Merit Systems Protection Board (board), affirming the decision of the Department of Transportation's Federal Aviation Administration (agency) to remove Martel from his position as air traffic control specialist at the Boston Air Traffic Control Tower, Logan Airport Facility, Boston, Massachusetts. The board also dismissed, as not an appealable adverse action, Martel's claim that the agency unlawfully suspended him, and hence owed him back pay, for the removal period. We affirm.

*Background*

General background concerning the facts and issues arising from the agency's removal of air controllers who

participated in an illegal strike is set forth in *Schapansky* v. *Department of Transportation*, No. 83-663, slip op. (Fed. Cir. 1984), and *Adams* v. *Department of Transportation*, No. 83-1155, slip op. (Fed. Cir. 1984), issued this day. Martel's case differs because he testified that he telephoned his facility approximately 1 week after he received notice of his proposed removal, to inquire if he could return to work, and was told "good luck." A record of a phone call appeared in the agency file, indicating that on August 18, 1981, Martel requested that he be allowed to return to duty and a J. Campbell responded that it was too late.[1] The agency removed Martel from his position as air controller effective September 1, 1981.

The board, in an initial decision by the presiding official,[2] sustained the agency's removal of Martel based on the charges of unauthorized absence and participation in an illegal strike. However, the presiding official found that the agency had improperly suspended Martel in violation of the procedures required under 5 U.S.C. § 7513(b) (1982),[3] for the period from Martel's phone call—which the presiding official determined was approximately August 10, 1981—until the date of Martel's

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[1] The agency contends that the record of this phone call was never properly admitted into the case record and hence may not be considered. This is incorrect. When Martel's counsel read aloud, before the presiding official, the list of documents incuding the phone call notation, agency counsel confirmed that this list conformed with his. Board proceedings are not governed strictly by the rules of evidence; rather, the standard for admissibility is relevance and materiality. 5 C.F.R. § 1201.62(a) (1983). Moreover, the statute provides that "any supporting material" maintained by the agency "shall" be furnished to the board upon its request. 5 U.S.C. § 7513(e) (1982). Support for inclusion of the phone call notation in the Martel record is therefore ample.

[2] *Martel* v. *Federal Aviation Admin.*, MSPB Initial Decision No. BN075281F0558 (Dec. 2, 1982).

[3] All section references are to title 5, U.S.C., except where otherwise indicated.

removal, September 1, 1981. This entitled Martel to 23 days' back pay. The full board reversed the presiding official on the question of improper suspension, but affirmed on the removal action.[4] Martel now exercises his right to appeal to this court.

*Issues*

Martel raises two issues which this court has resolved today adversely to his position, in *Schapansky, supra*: (1) that the board erred in holding that the agency established a prima facie case of strike participation; and (2) that the board erred in not mitigating the penalty of removal. This leaves three issues which we here address: (1) whether substantial evidence on the record supports the board's finding that the agency did not suspend Martel, such that there was no adverse appealable action and no back pay owed Martel; (2) whether the agency erroneously removed Martel because he did not have sufficient notification that his conduct could be considered strike participation; and (3) whether the board erred in rejecting Martel's intimidation defense.

*Opinion*

1. *Unlawful Suspension*

We are bound by our holding today in *Adams, supra*, that no constructive or unlawful suspension occurred, such that the agency owes back pay, where petitioning air controllers voluntarily failed to report to work as scheduled, were considered absent without leave, and were not paid for that unworked time. Most importantly, in *Adams* petitioners gave the agency no reason to believe that they wanted to return to work. By contrast, Martel did give the agency some such reason when he telephoned his facility. We must therefore examine more closely the

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[4] *Martel* v. *Department of Transp.*, MSPB Docket No. BN075281F0558 (Apr. 25, 1983), 1983 FMSR 7024.

meaning of the statutory term "suspension" before reviewing the board's decision that the agency did not suspend Martel during the notice period of his removal.

We note first, however, that Martel bore the burden of establishing that he was constructively suspended, such that there was an adverse appealable action over which the board had jurisdiction. *Adams, supra; Rose* v. *Department of Health & Human Services*, 721 F.2d 355, 357 (Fed. Cir. 1983); 5 C.F.R. § 1201.56(a)(2) (1983). In turn, our standard of review of the board's decision—whether it is "unsupported by substantial evidence" on the record—concerning the alleged suspension is governed by section 7703(c), set forth in the first footnotes of both *Novotny* v. *Department of Transportation*, No. 83-1161, slip op. (Fed. Cir. 1984), and *Dorrance* v. *Department of Transportation*, No. 83-1175, slip op. (Fed. Cir. 1984), decided today. Our jurisdiction attaches to the alleged suspension by means of sections 7512(2), 7513(d), 7701(a), and 7703(a)(1) and (b)(1), and 28 U.S.C. § 1295(a)(9).[5]

The statute provides that suspension "means the *placing* of an employee, for *disciplinary* reasons, in a temporary status without duties and pay." Section 7501(2). (Emphasis supplied.) The legislative history of this provision of the Civil Service Reform Act of 1978 enlightens us by stating that a suspension is a "*disciplinary* action temporarily *denying* an employee his duties or pay." S. REP. No. 969, 95th Cong., 2d Sess. 47, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2769 (emphasis supplied). Both the statute and the legislative history embrace at least two concepts which must be considered in determining whether a suspension exists: (1) the

[5] These provisions provide that suspensions for more than 14 days are the only suspensions appealable to the board and to this court. We consider that the presiding official's finding that the agency suspended Martel for 23 days covers this point (assuming phone call made approximately August 10).

agency must have *placed* the employee in the suspended status, without duties and pay, against his will (*i.e.*, the agency's action must be adverse); and (2) the agency must have so acted for *disciplinary* reasons.[6]

The determination whether the agency *placed* Martel in suspension status, against his will, is a factual matter. The record is devoid of any evidence that the agency did so from the moment Martel walked off the job at 7 a.m. on August 3, 1981, with another striker, 1 hour before his scheduled shift ended, until the day (August 10 or 18) when Martel telephoned the facility to ask if he could return. During this period Martel initially remained home, but he testified that after he received his notice of proposed removal on August 9, 1981, he joined the picket line, since:

> All else was lost. There was no way of getting back to work so I had no other recourse but to go on with the—with PATCO. People tried to get back to work but they were just not allowed to.
>
> * * * *
>
> * * * I did want to go back to work, still want to go back to work * * *.

Testimony of Lawrence Martel, June 28, 1982, at 472, 473, before board presiding official, excerpted in Martel appendix before this court at 564, 565.

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[6] The board used a tripartite test for interpreting the term "suspension": (1) the action must be involuntary; (2) the action must be disciplinary; and (3) the employee must, in fact, be ready, willing, and able to work during the period in question. *Martel*, note 4 *supra*. The board drew this test from an earlier board opinion concerning enforced sick leave. *Mosely* v. *Department of the Navy*, 4 MSPB 220, 221 (1980), 1980 FMSR 5173, *aff'd*, 229 Ct. Cl. 718 (1981). Our responsibility as reviewing court, where a matter of statutory interpretation is at issue, is to begin with the language of the statute and to hew closely to it. *Lindahl* v. *OPM*, 718 F.2d 391, 394 (Fed. Cir. 1983).

Although Martel may have been torn at this time between his wish to return to work and his belief that such an attempted return would have been futile, his actions (walking off the job without leave, joining the picket line) are to this point indistinguishable from those of the controllers in *Adams, supra.* The factual issue is a closer one, however, for the period between Martel's undisputed phone call requesting his return to work and his effective date of removal. Martel contends that his phone call communicated unequivocally to the agency that he was ready, willing, and able to return to work.[7] The presiding official agreed. The full board found otherwise:

> We find that the evidence of record is insufficient to establish that appellant was ready, willing, and able to work after receiving his proposed removal notice. Regarding his phone call to the agency sometime around the 10th of August, appellant does not mention to whom he talked, whether that person was a supervisor or had any decision-making authority, or what specifically he said to that agency employee. Based on the evidence of record, the Board cannot find that appellant unequivocally communicated to the agency his availability and his desire to return to duty. * * *

*Martel,* note 4 *supra.*

In the interest of thoroughness, we note precisely Martel's testimony regarding the phone call:

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[7] Martel and *amici* also contend that the board erred, as a matter of law, in requiring that Martel communicate his desire to return to work to an agency official with decision-making authority. To the extent that the board did impose such a test, this is error and not required by law. However, to whom Martel communicated his request to return to work, and how, is certainly relevant in determining whether, as a factual matter, Martel was ready, willing, and able to work.

> Q Did you try and go back after August 6, 1981?
>
> A Yeah, I did. A week later I believe it was, shortly thereafter; I called up and they—the conversation was good good [sic] luck. That's all there was to it.

Testimony of Lawrence Martel, *supra*, at 420, excerpted in Martel appendix at 512.

We note also the agency's record of Martel's phone call, and his testimony that he did want to return to work, both mentioned *supra*. Thus, there is in the record some evidence that would support a finding favorable to Martel. However that is not the test; our role is to determine whether there was substantial evidence in the record to support the conclusion reached by the board.

Faced with this weak record, and applying the statutory requirement that Martel be *placed* in suspension status, against his will, we cannot find the board's conclusion to be unsupported by substantial evidence. We do not know the identity or position of the Mr. Campbell to whom Martel, according to the agency file, spoke. More importantly, Martel himself apparently could not remember much about the conversation. Something more would be required, on the record, for this court to reverse the board and find that Martel was placed in suspension status against his will—*i.e.*, that he was in fact ready, willing, and able to come to work.[8]

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[8] *See*, by contrast, *Campbell*, v. *Department of Transp.*, MSPB Docket No. DE075281F0674 (Apr. 25, 1983), 1983 FMSR 7022. In that case the board found that appellant Root was unlawfully suspended from August 8, 1981, when he telephoned his facility asking to return, until his date of removal, September 2, 1981. The chief of the Denver Air Traffic Control Center testified that he received the call from Root on August 8 and advised Root that he could not return. Root was later observed on the picket line. *See also Anderson* v. *Department of Transp.*, No. 83-1153, slip op. (Fed. Cir. 1984), issued today, in which one controller, Mr. Kolody, was found by the board to have been constructively suspended when he

Regarding the second statutory requirement concerning a suspension—that it be for disciplinary reasons—we need not reach this point. Having affirmed the board on its factual finding that Martel was not *placed* in a non-pay, nonduty, status against his will, we affirm the board's conclusion that he was not constructively suspended.

2. *Insufficient Notification*

Martel's argument that the agency erroneously removed him because he had insufficient notice that his conduct could be considered strike participation, is disingenuous. To begin with, in June 1981, the assistant chief at the Boston Tower facility counseled Martel about the serious consequences, including a fine or imprisonment, which could result from striking. Martel contends that the counseling took place in a large noisy room and that he had little idea what was being read. One would think that a reasonably concerned individual would, assuming he was confused at this point, take it upon himself to inquire further of his colleagues or his supervisor about the purpose of the counseling session and what was read. It would have at least been obvious to such a person that the session was important, and that it pertained directly to his livelihood.

In addition, the agency sent out two mass communications to all air controllers concerning the possible consequences of a strike. Martel contends that he received neither a letter from the agency administrator, warning of the consequences of striking, nor a telegram warning that strike participation could result in his removal. The board considered and rejected the evidence in this regard, and we do not disturb that finding. Petitioner's general contentions on this point, viewed in the context of the widespread, nationwide discussion of a possible

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actually met with his facility chief to tell him that he (Kolody) wanted to return to work.

strike at that time, approach the level of a game of blindman's buff with the law. This we cannot sanction, and we affirm the board on this issue.

### 3. *Intimidation Defense*

Finally, Martel defends against the charge of strike participation by arguing that he was coerced into participating by fear of subsequent economic and psychological intimidation, as well as by fear of physical harm. In particular, he cites the union harassment technique of monitoring the work of nonparticipating controllers and reporting minor infractions (even inventing such infractions) until the controller loses his job or is suspended. When asked why he did not go to work, he testified:

> I was just scared that—I didn't know what was going to happen. I was scared that—well, I knew that I was going to be harrassed [sic], you know, it was foregone conclusion. I knew that I was going to be harrassed [sic] and I didn't know just to what extent and I also knew that if I did stay at work and when everybody came back is that my job was limited to a month, two months, before they had enough evidence and enough violations against everyone for some way—in some way, shape and form to do away with the job.

Testimony of Lawrence Martel, *supra* at 418, excerpted at 510.

We have held in *Johnson* v. *Department of Transportation*, No. 83-664, slip op. (Fed. Cir. 1984), issued today, that the critical inquiry in determining whether an employee's action was coerced is whether that action was voluntary or involuntary, using the objective "reasonable person" test. In using this test, the court must look to the behavior of the normal, reasonable person as opposed to the subjective behavior of a particular individual in particularized circumstances. *Johnson, supra*;

*Christie* v. *United States*, 518 F.2d 584, 587 (Ct. Cl. 1975).

Martel contends that it is error to require that the type of coercion directed to the individual consist, in the case of an illegal strike, exclusively of a reasonable fear of *physical* danger to that person or others. We have not so limited our discussion of coercion in *Johnson* and do not do so here. To the extent that the board has so limited its definition, we hold that it erred.[9] However, as we have emphasized throughout our opinions issued today concerning the air controllers' nationwide strike, "[s]triking against the government is a grave offense * * * and a criminal offense * * * [which] disrupts the functioning of the government itself." *Schapansky, supra.* The goals of the strikers were "to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety." *Id.* (citation omitted). Given this serious situation, objective evidence of the involuntary nature of an employee's strike participation, as a rebuttal of a prima facie charge thereof, where such evidence consists of threats of nonphysical harm, must be especially strong. Certainly, Martel's vague and speculative worries of future job harassment, leading to possible job suspension or re-

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[9] Our reading of the board's *Johnson* decision does not support Martel's restricted view. In this court's *Johnson* opinion issued today, we pointed out that the board noted that "fear of 'financial ruin' or jeopardy to career advancement * * * *may* not suffice to render involuntary appellant's alleged participation in this case." (Emphasis supplied.) In our view the board thus holds open, correctly, the possibility that an employee's participation in a strike *may* be rendered involuntary in certain exceptional circumstances involving threats of harm of a non-physical nature. This is consistent with the board's rejection in its *Johnson* opinion of a criminal standard for the definition of duress, while hewing to a stricter standard than that allowed in normal civil cases, where participation in an illegal strike is not at issue.

moval, fall far short of the type of objective evidence which would suffice. A person of ordinary firmness would reasonably be expected to resist such fears, rather than join an illegal strike for which the law provides criminal penalties.

Martel's allegations of fear of physical danger to himself are even more vague, amounting to little more than threats that he would be "sorry" if he didn't join the strike, and falling short of those claims alleged and rejected in *Johnson*, *supra*. In sum, applying the legal test outlined here and in *Johnson* concerning the duress defense, we find that substantial evidence exists on the record for the board's decision that Martel's intimidation defense fails. We therefore affirm.

*AFFIRMED*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Appeal No. 83-1150

STEPHEN J. MOYLAN,*
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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DECIDED: May 18, 1984

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Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

PER CURIAM.

This is an appeal from a decision of the Merit Systems Protection Board (Board) affirming the Federal Aviation Administration's (agency's) decision to remove the petitioner from his job as an air traffic controller. We affirm.

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* The Board decided the appeals of two other controllers, listed in the appendix to this opinion, at the same time it decided Moylan's case. These individuals have filed separate appeals before this court. The issues raised in those appeals have been considered and decided in the decisions handed down by the court today. The petitioners listed in the appendix shall notify the court within 14 days of the date of this opinion regarding their intent to withdraw or further prosecute their appeals. Absent notification within that period, the appeals listed in the appendix will be dismissed. *See Asberry v. United States Postal Service*, 692 F.2d 1378 (Fed. Cir. 1983).

Prior to August 3, 1981, the petitioner served as an air traffic controller at the New York Air Route Traffic Control Center at Ronkonkoma, New York. On August 3, 1981, the Professional Air Traffic Controllers Organization began a nationwide strike against the agency.

Petitioner Moylan did not appear for his scheduled shift on August 3. August 4 and 5 were his regular days off, and he again failed to appear on August 6. The record contains no evidence that the petitioner attempted to contact his supervisor to explain his absence. He was removed for striking and being absent without leave on August 3-6.

The petitioner appealed his removal to the Board, which affirmed the agency action.

The petitioner objects to his removal on several grounds: that the agency did not prove that he intended to strike or that he acted in concert with others; that the agency improperly shifted the burden of proof concerning strike participation; that the strike ended on August 5, 1981, so that the agency's decision to remove him for striking after that date was invalid; that the President improperly influenced the agency's deciding official; that the agency failed to follow statutory procedures in effecting petitioner's removal; that removal was too harsh a penalty for the offense; and that the Board prejudiced the petitioner's case by consolidating it with 79 other cases for hearing before the Board's presiding official.

Except for the last issue, this court has thoroughly considered and rejected these arguments in two other cases decided today. *See Schapansky v. Department of Transportation*, No. 83-663, decided today; *Adams v. Department of Transportation*, Nos. 83-1155, 83-1159, 83-1160, decided today. Those decisions control here.

The only issue the petitioner raises that those cases did not decide is whether consolidation of the petitioner's case with those of 79 other air traffic controllers denied

him an opportunity for a fair hearing before the Board. The Board concluded that the petitioner had waived any objection to the consolidation because he and the other controllers and the government jointly had requested consolidation. The petitioner has not denied that he did so. We cannot say that the Board's finding is arbitrary or unsupported by substantial evidence.

By joining the request for consolidation, the petitioner waived any objection he may have had to that procedure. *Ikerd v. Lapworth*, 435 F.2d 197, 204 (7th Cir. 1970).

The decision of the Merit Systems Protection Board affirming the removal of the petitioner is affirmed.

*AFFIRMED*

APPENDIX

| Petitioner | MSPB Docket No. | Fed. Cir. Appeal No. |
|---|---|---|
| Harvey K. Hatch | NY075281F0574 | 83-1151 |
| Joseph R. Noa | NY075281F0680 | 83-1152 |

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Appeal No. 83-1175

BERNARD DORRANCE,
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

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DECIDED: May 18, 1984

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Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

RICH, *Circuit Judge.*

This appeal is from the April 25, 1983, decision of the Merit Systems Protection Board (Board) sustaining the removal of Bernard Dorrance from his position as Air Traffic Control Specialist by the Department of Transportation's Federal Aviation Administration (agency). The bases for the removal were proven charges of striking against the United States and absence without leave. We affirm.

*Background*

Dorrance was employed as an air traffic controller at the New York Air Route Traffic Control Center, Ronkonkoma, New York. On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) commenced a nation-wide strike against the agency. Dorrance failed to report for duty as scheduled at 3 p.m. on August 3, 1981. By letter of August 6, the Chief of the air

traffic center notified Dorrance that he was charged with striking against the United States Government and with being absent from duty without authorization, and was apprised of his proposed dismissal. In a letter of August 10, Dorrance requested an extension of time in which to file a written response to the charges. By separate letter on that date, he also requested certain material relevant to the agency's proposed action, under the Freedom of Information Act. A third letter by Dorrance on August 13 noted that "because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time."

The request for an extension of time was denied by letter of August 12, and, by letter of August 19, the center's Chief, Louis C. Pol, dismissed Dorrance effective August 22, 1981. Dorrance appealed to the Board and, after a hearing, a Presiding Official sustained the agency's removal, as did the Board on petition for review in *Adams et al.* v. *Department of Transportation* (Docket No. NYO75281FO424, April 25, 1983). Dorrance did not deny the charges against him at any stage of these proceedings, nor did he elect to testify during the hearing before the Presiding Official.

More details concerning the air traffic controllers' strike are set forth in related cases decided concurrently herewith: *Schapansky* v. *Department of Transportation*, No. 83-663 (Fed. Cir. May 18, 1984); and *Adams* v. *Department of Transportation*, 83-1155 (Fed. Cir. May 18, 1984).

*Issues*

Dorrance challenges the agency's removal action on several grounds, principally, (1) the agency failed to meet its burden of proof that he participated in a strike; (2) the agency erred by invoking the "crime" provision of 5 USC 7513(b) to shorten the advance notice period to Dorrance before his dismissal; (3) that his removal does not promote the efficiency of the service; and (4) that the penalty of removal is grossly disproportionate to

the nature of the offense. Such issues were raised in *Schapansky*, supra, and Dorrance's appeal on these grounds is rejected for the reasons set forth in *Schapansky*.

Dorrance further contends that (5) the Presiding Official erred in drawing a negative inference from Dorrance's failure to testify in his own behalf. This argument is unavailing. Silence added to the sufficiency of the agency's case when it follows the agency's establishment of a prima facie case, as discussed in our decision in *Adams*, supra.

Additional arguments by Dorrance for reversal of the Board's decision are: (6) the Presiding Official improperly relied upon hearsay evidence, i.e., the Time and Attendance Reports of the agency used to corroborate Dorrance's absence from work on August 3, 1981; (7) the harmful effect of consolidating Dorrance's case with those of 63 other air traffic controllers before the Presiding Official; (8) the harmful effect of the agency's denial of Dorrance's request of August 10 for an extension of time; (9) the violation of due process represented by alleged "dilatory" tactics of both the agency and the Presiding Official; and (10) that the agency prevented his return to work.

## OPINION

Initially, we note that our standard of review for decisions of the Board is prescribed in 5 USC 7703(c).[1]

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[1] 5 USC 7703(c) provides in pertinent part:

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; . . . .

The Presiding Official heard the testimony of Chief Pol, and noted that he identified schedules, logs, and time and attendance records which documented, inter alia, the absence of Dorrance commencing on August 3, 1981. Dorrance contends that the unsupported testimony of the Center Chief is not sufficient to prove that he was striking, and that these various records are hearsay and also ineffective because of evidentiary deficiencies such as a lack of testimony as to their accuracy or the manner in which they were made and maintained.

As explained in *Schapansky*, proof of a wide-spread strike of general knowledge, together with Dorrance's absence without authorization or explanation during the strike constitutes at least a prima facie case of his participation in the strike. Dorrance neither denied his absence nor the existence of a strike; nor does he argue that he objected to Chief Pol's testimony or documents relied upon therein at the time of the hearing. The Board found that the unrebutted testimony of Chief Pol was sufficient to establish a prima facie case of striking. Furthermore, the documents appear probative and would be competent evidence though hearsay before the Board in any event. *See, e.g., Borninkhof* v. *Department of Justice*, 5 MSPB 150, 153 (1981); and *Brewer* v. *United States Postal Service*, 647 F.2d 1093, 1097-98 (Ct. Cl. 1981), *cert. den.*, 454 U.S. 1144 (1982).

Dorrance next claims that the consolidation of his case along with 63 "other appeals on one day" was harmful error, and violated his due process rights to a fair hearing.[2] Dorrance admits that the Presiding Official has discretion to consolidate appeals under 5 USC 7701(f); however, he contends that this consolidation "rendered the hearing a sham" and "chilled and reduced his oppor-

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[2] 5 USC 7701(c)(2) provides that the Board may not sustain an agency decision "if the employee . . . (a) shows harmful error in the application of the agency's procedures in arriving at such decision; . . . ."

tunity as a matter of law, to introduce evidence in his own defense." This contention is at best disingenuous because Dorrance did not object to the consolidation until now, and because he made no attempt to introduce evidence in his own defense. The consolidated appeals involved substantially the same issues and questions of fact and the same counsel represented all of the appellants. Furthermore, the one controller who did present an individual defense, Mr. Copping, was singled out for separate treatment in the Presiding Official's decision. Dorrance has not shown any harm to his opportunity to defend himself nor that this consolidation was an abuse of the Presiding Official's discretion.

The agency denied a request by Dorrance in his letter of August 10, 1981, for an extension of the time in which to respond to the charges set forth in Chief Pol's letter of August 6, 1981. This request was based on three reasons: (1) the agency improperly decreased the statutory thirty days advance notice of removal on the ground that he had committed a crime; (2) even if the crime exception is invoked, he is entitled to a reasonable time to reply and the seven days granted was not reasonable; and (3) he needed time to view materials that the agency relied upon to support its proposed removal as well as other documents requested under the Freedom of Information Act (FOIA). The first two contentions were rejected in *Schapansky* and *Adams*, supra. In its letter of August 12, the agency rejected the request for extension but addressed only part of Dorrance's third reason, noting that the material requested under the FOIA had not been relied upon by the agency for the proposed action.

On appeal here, Dorrance argues that extension requests "should be liberally granted," and that had "he received the extension of time, he very well may have replied to the proposed dismissal." Dorrance thus contends that lack of documents and lack of response time

precluded an opportunity to make a meaningful response. The Board ruled that the wording of the August 3 notice of proposed dismissal did not lack sufficient particularity as to the charges against him. We agree. *See Anderson* v. *Department of Transportation*, No. 83-1153 (Fed. Cir. May 18, 1984). Dorrance attributes harmful effect to this denial, but he has not shown that the agency's decision precluded a meaningful response to the charges. The mere allegation of harm is unpersuasive.

Dorrance contends that the agency engaged in dilatory tactics during the course of proceedings, including failure to meet certain deadlines and to respond to certain of his motions and requests, and that this violated his due process rights. Indeed, Dorrance moved for sanctions against the agency, but these were not granted by the Presiding Official. Dorrance contends that it was "a gross perversion of justice for, on [the] one hand to hold that petitioner could not have more than seven days to respond to the charges; but on the other hand, to essentially give respondent all the time it required . . . ." The Board held that, absent a showing that the Presiding Official had abused his discretion, his determinations will not be found to constitute reversible error. To be "harmful error" necessitating our reversal of the Board, the error must substantially impair an employee's rights. *Brewer*, supra; *Shaw* v. *United States Postal Service*, 697 F.2d 1078 (CAFC 1983).

The Board considered the special circumstances of this strike in which approximately 11,000 related air traffic controller "appeals can and should be recognized." Notwithstanding agency delays the Board concluded that the Presiding Official's management of the case and the agency's conduct were not shown to have caused any "prejudicial harm to appellants' presentation of their cases." On appeal to this court, Dorrance has demonstrated no such harm to his rights, and we find no deprivation of due process.

Finally, Dorrance urges reversal of the Board on the ground that he was effectively "locked out" of the Air Route Traffic Control Center and prevented from returning to work. This contention is based both on an announcement by Chief Pol over the public address system on August 5, 1981, at 11 a.m., that any air traffic controllers then outside the facility who wanted to report for work would be escorted into the facility, and upon President Reagan's announcement, 48 hours earlier, that controllers who had not reported for work within 48 hours would be fired. Chief Pol testified that the gates were not locked at the time of the announcement. The Board found that, "Viewed in a light most favorable to appellants, the most that can be found from these circumstances is that anyone within hearing distance of the announcement (which appellants do not claim to have been) was specifically informed not that he or she could not return to work, but rather that he or she could."

The Board also found that it was incumbent upon the individuals removed from service to seek "any necessary clarification" as to the actual time of the deadline for their return to work. Additionally, the Board found that any perceived futility in attempting to return to work did not relieve them from attempting to contact the facility. The Board's holding that Chief Pol's statements did not serve to "lock out" Dorrance was supported by substantial evidence.

*Summary*

We hold that the agency's procedures were in accordance with the law and that its actions and those of the Presiding Official involved no error. Accordingly, for reasons stated herein and in the related cases decided today, the Board's decision sustaining the August 22, 1981, permanent removal of Dorrance by the agency from his position as Air Traffice Control Specialist at the New York Air Route Traffic Control Center is *affirmed.*

*AFFIRMED*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Appeal No. 83-1158

ANTHONY L. DIMASSO,
*Petitioner,*

v.

DEPARTMENT OF TRANSPORTATION, FAA,
*Respondent.*

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DECIDED: May 18, 1984

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Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

SMITH, *Circuit Judge.*

Petitioner Anthony L. DiMasso (DiMasso) appeals from a decision of the Merit Systems Protection Board (board), affirming the decision of the Department of Transportation's Federal Aviation Administration (agency) to remove DiMasso from his position as air traffic controller specialist at the New York Air Traffic Control Center in Ronkonkoma, New York. We affirm.

*Background*

General background concerning the facts and issues arising from the agency's removal of air controllers who participated in an illegal strike is set forth in *Schapansky* v. *Department of Transportation*, No. 83-663, slip op. (Fed. Cir. 1984), and *Adams* v. *Department of Transportation*, No. 83-1155, slip op. (Fed. Cir. 1984),

issued this day. In DiMasso's case, DiMasso was on annual leave between August 2 and 9, 1981, and was scheduled to return to his 4 p.m. shift on August 9. When he failed to do so, the agency served him the next day with a notice of proposed removal, alleging participation in an illegal strike and absence without leave. DiMasso responded on August 13 and 14, 1981, requesting an extension of time, excepting to application of the statutory crime provision, and requesting certain additional information. He did not, however, either at this point or subsequently in the proceedings, offer reasons or evidence for his failure to return to his scheduled shift on August 9. The agency removed DiMasso effective August 27, 1981, and he appealed to the board which, in an initial consolidated decision by the presiding official dated October 14, 1982, affirmed the removals of all but one of the air controllers whose removals from the New York Air Traffic Control Center were considered.[1] DiMasso appealed to the full board which, in a final consolidated decision issued April 25, 1983, likewise affirmed his removal.[2] DiMasso now exercises his right to appeal to this court.

*Issues*

DiMasso has raised numerous issues before this court, including: (1) that the agency failed to sustain its burden of proof as to every element of the charges; (2)

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[1] The board's presiding official found that a preponderance of the evidence did not support the charge of striking for one controller who had been on sick leave. *Adams* v. *Federal Aviation Admin.*, MSPB Initial Decision No. NY075281F0424 (Oct. 14, 1982). The agency did not contest that finding.

[2] *Adams* v. *Department of Transp.*, MSPB Docket No. NY075281F0424 (Apr. 25, 1983), 1983 FMSR 7019. The full board found that the agency failed to establish by a preponderance of the evidence that two controllers involved in that appeal participated in a strike and were absent without leave, because opposing evidence indicated that they were on jury duty under court leave at the time.

that the board erred in shifting the burden of persuasion once the agency had shown a prima facie case of strike participation; (3) that the agency introduced only hearsay evidence insufficient to make a prima facie case; (4) that the board erred in drawing an adverse inference from DiMasso's silence; (5) that the agency erred in applying an emergency suspension; (6) that the agency erred in allowing DiMasso less than 7 days to respond to the notice of removal; (7) that the penalty of removal did not promote the efficiency of the service; (8) that the penalty should be mitigated; (9) that the deadline shift rule created such confusion as to cause the agency's burden of strike participation to rise; (10) that the agency erred in failing fully to apprise DiMasso of his constitutional right against self-incrimination; and (11) that the President's edict and cabinet level orders to the proposing and deciding officials improperly influence DiMasso's removal, causing harmful error. Except for the last two issues, this court has thoroughly considered and rejected those argument in other cases decided today.[3] Those decisions control, and we address the remaining two issues here.

*Opinion*

1. *Duty to Advise on Self-Incrimination*

DiMasso contends that the agency committed harmful error by failing fully to apprise him of his constitutional right against self-incrimination under the fifth amend-

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[3] In the order to which they relate to each issue enumerated above, those cases, likewise entered today, are: (1) *Schapansky* v. *Department of Transp.*, No. 83-663, slip op. (Fed. Cir. 1984); (2) *Schapansky*; (3) *Dorrance* v. *Department of Transp.*, No. 83-1152, slip op. (Fed. Cir. 1984); (4) *Adams* v. *Department of Transp.*, No. 83-1155, slip op. (Fed. Cir. 1984); (5) *Schapansky; Novotny* v. *Department of Transp.*, No. 83-1161, slip op. (Fed. Cir. 1984); (6) *Adams*; (7) *Schapansky; Johnson* v. *Department of Transp.*, No. 83-664, slip op. (Fed. Cir. 1984); (8) *Schapansky*; and (9) *Adams*.

ment. In support of such duty by the agency he cites a memorandum date June 4, 1980, by then-Attorney General Benjamin Civiletti, outlining general guidelines for procedures in administrative investigations of certain employee misconduct and discussing the necessity for warnings on fifth amendment rights to prevent loss of evidence. Need for the memorandum arose, as it states in its first sentence, from "the need to coordinate with the Criminal Division [of the Department of Justice] certain actions that may impact adversely on the prosecution of criminal cases arising out of the same or parallel facts." Specifically, the Attorney General was concerned that improper agency procedures during administrative investigations of employee misconduct would result in statements and evidentiary leads arising from those investigations subsequently being held inadmissible as evidence in a criminal prosecution of that employee.

In DiMasso's situation, his opportunity to respond to a notice of proposed removal did not reach the level of a custodial interrogation. He was not compelled to give testimony as a *quid pro quo* for retaining his job; he was free to deny participation in an illegal strike but chose not to do so. Moreover, even if one were to assume that the Attorney General's memorandum was binding (which it was not), then the probable consequences of an agency's failing to follow that document would be felt not in these civil removal proceedings but in any subsequent criminal investigation.[4] We affirm the board in its rejection of DiMasso's position on the duty to advise.

### 2. *Influence from Above*

DiMasso also contends that the President's statement on August 3, 1981, that striking air controllers who had not returned to work by 11 a.m. August 5, 1981, would be fired, preempted the authority of the board's presiding

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[4] *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).

official and "improperly aborted" the statutory and regulatory removal procedures. He contends as well that follow-up orders by the Secretary of Transportation and other confirming and detailing the President's position likewise predetermined the outcome of his case, making it, in effect, a sham. In DiMasso's view these procedures, directed from the "top down," constituted harmful error.

In *Schapansky*, we considered DiMasso's contention, along with the more specific charge that the President's announcement in effect deprived individual controllers of a meaningful opportunity to reply to the proposed removal, and do not repeat that discussion here. We note that in the cases of certain controllers who denied the striking charges and presented evidence thereof, the board's consideration resulted in reversal of the agency's position.[5] We reiterate as well that this court is bound by Court of Claims precedent,[6] which has held that there is "nothing improper" about an agency's predetermining the penalty of removal, provided that the employee has full opportunity to present facts rebutting the charges.[7] DiMasso chose not to present evidence rebutting the charges of illegal strike participation and absence without leave; he instead chose to respond with "a blast of procedural objections."[8] Having rejected those objections, we affirm the board's decision upholding the agency's removal of DiMasso.

*AFFIRMED*

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[5] *See, e.g.*, notes 1 and 2, *supra*.

[6] *South Corp.* v. *United States*, 690 F.2d 1368, 215 USPQ 657 (Fed. Cir. 1982).

[7] *Pascal* v. *United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976).

[8] *Id.* at 1288.

## APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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Docket Number DA075281F1130

ROY L. SCHAPANSKY

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

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## OPINION AND ORDER

The Department of Transportation's Federal Aviation Administration (agency) removed Roy L. Schapansky (appellant) from his GS-14 position of Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas, effective August 26, 1981. The agency based the removal action on charges of participation in a strike against the Federal Government from August 3 to August 5, 1981, in violation of 5 U.S.C. § 7311, and absence without leave for the same period.

On appeal to the Board's Dallas Regional Office, the presiding official designated to adjudicate the matter sustained the appellant's removal following a hearing at which both parties were represented by counsel. The presiding official determined, in his initial decision dated May 14, 1982, that the agency had established by a preponderance of the evidence (1) that the appellant was a member of the Professional Air Traffic Controllers Organization (PATCO); (2) that the appellant was aware of the existence of a strike by Federal employee members of PATCO; and (3) that he intended to and did,

in fact, participate in that strike by refusing, in concert with others, to provide his services to his employer.

The presiding official held further that the agency did not err in applying the statutory provision of 5 U.S.C. § 7513(b)(1) to waive the general requirement of thirty days' notice before deciding upon and effecting an adverse action. He found that the agency had the requisite "reasonable cause to believe the employee ha[d] committed a crime for which a sentence of imprisonment may be imposed," since 18 U.S.C. § 1918 proscribes striking by Federal employees under penalty of a fine and/or imprisonment.

The presiding official determined, finally, that once 5 U.S.C. § 7311 has been invoked by the agency, the statute mandates the removal of a Federal Government employee who participates in a strike against his employer. He therefore concluded that the appellant's removal for such participation was required by statute to promote the efficiency of the service under 5 U.S.C. § 7513(a).

The appellant has now petitioned the Board for review of the initial decision, and the agency has opposed that petition. The Board hereby GRANTS review under 5 U.S.C. § 7701(e)(1).

The appellant asserts in his petition that the presiding official erred in denying his pre-hearing motion for continuance of the hearing and for an extension of time for discovery. With regard to a hearing continuance, the appellant argued before the presiding official that the agency did not respond to the presiding official's order to produce certain evidence until three working days before the scheduled hearing, and that this delay rendered him unable to prepare his case adequately. The evidence in question consisted of the agency's "Adverse Action Handbook," containing a table of penalties for various employee offenses, and the names and addresses of several

potential witnesses. The presiding official denied the continuance but extended the proceedings in this case until fourteen days after the hearing in order to afford the appellant time to consider that evidence and to submit written argument and/or additional evidence with respect to that material. Hearing Transcript (Tr.) at 5-6. The appellant made no such submissions regarding these matters, however, and does not attempt to demonstrate on review specifically how his ability to prepare his case was prejudiced in this regard. The Board therefore finds no error adversely affecting the appellant's substantive rights in the presiding official's denial of his motion for continuance of the hearing. *See Karapinka* v. *Department of Energy*, MSPB Docket No. PH07528010382 (May 8, 1981).

The appellant also contended before the presiding official that an extension of time for discovery was necessary to enable him to utilize information obtained by other aggrieved air traffic controllers through nationwide and regional discovery procedures in related appeals before the Board. By order of April 7, 1982 (ALJ-1), the Board's Chief Administrative Law Judge prescribed a supervised and controlled procedure of common discovery on matters of national and regional scope in some 11,000 related air traffic controller appeals. That order restricted participation in such discovery to those appellant air traffic controllers who had filed timely discovery requests under the pre-hearing orders issued by the Board's several Regional Officers.

In the appeal now before the Board, the presiding official issued a pre-hearing order on February 3, 1982, requiring that discovery motions in all related air traffic controller cases appealable to the Board's Dallas Regional Office be filed on or before February 25, 1982. Because the appellant had not filed a discovery request with regard to matters of nation-wide or region-wide scope by the specific deadline, the presiding official denied his April 22, 1982, motion for an extension of time for

discovery. Because the language of ALJ-1 explicitly limits participation in the consolidated discovery procedures to those who filed timely and relevant discovery requests pursuant to previous pre-hearing orders, the Board finds that the presiding official's refusal to postpone the hearing and extend the discovery period to allow the appellant to partake of the results of that process did not deny him due process. We can discern no error by the presiding official in this regard.

In his petition for review, the appellant reiterates his basic contention that there was no factual evidence adduced to support a finding that he had participated in a strike against his employer in concert with others. During the course of the hearing, however, the appellant conceded that he was absent without official or approved leave on August 3, August 4, and August 5, 1981, and that he was absent on those dates in order to protest the same conditions that other PATCO members were protesting by withholding their services. Tr. at 8, 139, and 149. He explained that, while other PATCO members were "thinking different" and considered their protest to be a strike, he believed his voluntary absence to be a legal protest and that PATCO's "lawyers would take care of it." *Id.* at 149-150. However, considering the appellant's further testimony that he voted "yes" when a "strike vote" was taken by PATCO members on August 2, 1981, and that he had been informed by the agency that the strike would be in violation of law, *id.* at 131 and 140, the presiding official found incredible the appellant's contention that he was unaware of the strike, and did not intend to participate in the strike.[1] The Board defers to the presiding official's assessment of

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[1] The Board has since taken official notice of the fact that a strike by PATCO members against the Federal Government began on August 3, 1981, and continued at least through August 5, 1981, and found that such strike was illegal. *Ketchum* v. *Department of Transportation*, MSPB Docket No. DA075281F0713 at 9 (May 28, 1982).

the hearing testimony in this regard. *See Weaver* v. *Department of the Navy*, 2 MSPB 297, 298-99 (1980).

The presiding official also gave no credence to the appellant's assertions that he took part in the strike because he was harassed and in fear for his personal safety. The appellant has not challenged that conclusion in his petition for review, nor has he otherwise asserted that his absence from work was involuntary. The Board finds no reason to disturb the presiding official's determination as to that issue.

In his petition, the appellant does challenge, however, the agency's use of a photograph of him among PATCO picketers on August 5, 1981, as evidence of his participation in the strike. He emphasizes that the photograph does not depict him carrying a picket sign, and that the agency produced evidence that he was among the picketers only on August 5, 1981. The Board has held that evidence of an employee's unauthorized absence from duty and his presence among picketers—both of which the agency has clearly demonstrated in this case—may constitute a *prima facie* case of his participation in a strike.[2] However, it is an employee's voluntary withhold-

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[2] *Jones* v. *Tennessee Valley Authority*, MSPB Docket No. AT07528010300 at 7 (February 19, 1982); *Duckett and Yardley* v. *Tennessee Valley Authority*, MSPB Docket No. AT07528010325 at 6 (February 19, 1982). In those cases, the Board indicated that an effective *prima facie* case of strike participation need not always include a showing of the appellant's presence among picketers. In a case, such as this one, in which the existence of a nationwide strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. The burden of persuasion would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. The agency, of course, must ultimately establish appellant's participation by a preponderance of the evidence pursuant to 5 U.S.C. § 7701(c)(1)(B).

ing of services in concert with others, and not his physical presence on a picket line, which constitutes the gravamen of such a charge.[3] Thus, the appellant's arguments regarding his not holding a picket sign in the photograph of him among the strikers on August 5, 1981, and his absence among the picketers on August 3 and 4, 1981, are unpersuasive as to his volition. Since the appellant did not rebut the agency's evidence of his knowledge of the strike and his intent to withhold his services along with other PATCO members, and since he made no showing that his absence was due to some factor other than strike participation, the Board concurs with the presiding official's determination that the appellant participated in the strike, as the agency charged.

The appellant further objects in his petition to the presiding official's conclusion that the agency properly relied on the so-called crime provision of 5 U.S.C. § 7513 (b)[4] in order to waive the thirty-day period of advance written notice of adverse action otherwise required under that provision. The appellant argues that because he had not been formally charged with or convicted of a

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[3] *See Tennessee Valley Authority* v. *Bailey*, 495 F. Supp. 711, 712 (E.D. Tenn. 1980). It has been held that "concerted" activity "does not necessarily require some overt manifestation of physical action on the part of employees based on some prior compact among them, such as the decision to lock arms and march against an employer making claims of opposition to him." *Hugh H. Wilson Corp.*, 171 NLRB 1040, 1046 (1968). As stated in *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.), *aff'd*, 404 U.S. 802 (1971), it is the "actual refusal in concert with others to provide services to one's employer" which constitutes strike participation.

[4] That statutory provision reads, in pertinent part, as follows:

An employee against whom an action is proposed is entitled to . . . at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action . . . .

5 U.S.C. § 7513(b).

crime, and because the agency had not proved his intent to do anything illegal, the use of the crime exception was improper. However, the Board has adopted none of these factors as strict prerequisites to a finding of "reasonable cause to believe" that a crime punishable by imprisonment has been committed sufficient to justify the use of the crime provision. *See Martin* v. *Department of the Treasury*, MSPB Docket No. AT075209044 at 8-10 (June 1, 1982) (discussing "reasonable cause to believe" that a crime punishable by imprisonment has been committed in the context of the imposition of an indefinite suspension).

The legislative history of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, reflects the well-settled belief that the thirty-day notice provision is one of "the minimum rights of an employee against whom an adverse action is proposed," and that such a period may be denied only where there is reasonable cause to believe the employee is guilty of a crime for which a sentence of imprisonment can be imposed.[5] Because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because appellant was absent from work during the strike and was among the picketers, the Board concurs with the presiding official's finding that the agency had reasonable cause to believe that the appellant committed a crime for which a sentence of imprisonment might be imposed. Thus the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified.

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[5] *See* S. Rep. No. 969, 95th Cong., 2d Sess. 50 (1978). The provision for 30 days' advance notice and the exception in cases of criminal conduct originated in the Veterans Preference Act of 1944, c. 287, 58 Stat. 387, 389. By Executive Order No. 11491, 34 Fed. Reg. 17605 (1969) (printed in note following 5 U.S.C.A. § 7101), the same procedure was applied to all non-preference eligible employees in the classified service prior to adoption of the Civil Service Reform Act.

The presiding official rejected appellant's contention that his removal was an unreasonable penalty, which should be mitigated. The Board has held consistently that, as a general rule, it has authority to reduce the penalty imposed by an agency if certain mitigating circumstances exist. *Davis* v. *Department of Treasury*, MSPB Docket No. NY075209075 (Oct. 2, 1981); *Douglas* v. *Veterans Administration*, MSPB Docket No. AT075299006 (Apr. 10, 1981). This rule, however, does not apply if the statute under which an employee is removed imposes a mandatory minimum penalty. *Special Counsel* v. *Dukes*, MSPB Docket No. HQ120600020 (Oct. 29, 1981) (a 30-day suspension is the minimum mandatory penalty under a Hatch Act provision, 5 U.S.C. § 7324); *Woody* v. *General Services Administration*, MSPB Docket No. SF07528110028 (June 2, 1981); (a one-month suspension is the minimum mandatory penalty under 31 U.S.C. § 638a(c)(2) for misuse of a government vehicle). The presiding official relied upon these cases to conclude that the Board may not mitigate the penalty where the agency proves a charge of participation in a strike.

The text of 5 U.S.C. § 7311(3)[6] can be read to require removal as the mandatory penalty for individual federal employees against whom charges of striking are sustained. Indeed, the United States Court of Appeals for the Ninth Circuit recently held that an agency may not be required, based on a mitigation theory, to reinstate an employee who was removed pursuant to § 7311 (3), for participation in a strike. *American Postal Workers* v. *U.S. Postal Service*, 682 F. 2d 1280, (9th

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[6] The statute provides in pertinent part:

§ 7311. Loyalty and striking.

An individual may not accept or hold a position in the Government of the United States * * * if he—

* * *

(3) participates in a strike, or asserts the right to strike, against the Government of the United States * * *.

Cir. 1982). In the present case we need not decide whether, as a matter of law, mitigation of the penalty is foreclosed under § 7311(3). Whether or not we have authority to mitigate the removal penalty under the standards established in *Douglas, supra,* no satisfactory basis for mitigation exists in this case.

In *Douglas, supra,* the Board concluded that it has authority to review penalties and to mitigate those which are "clearly excessive," "disproportionate to the sustained charges," "arbitrary, capricious or unreasonable," or an "abuse of discretion." In the matter now before the Board, the gravity of the offense of participation in a strike against the Government by the appellant as a Federal employee is self-evident.[7] By its very nature, it disrupts the Government's performance of its mission and is grounds for termination.[8] As discussed above, participation in a strike against the Federal Government is a criminal offense, punishable by imprisonment for up to one year. 18 U.S.C. § 1918. This is a further indicia of the gravity of this conduct.

Perhaps more important, as the Board noted in *Borsari* v. *Federal Aviation Administration,* MSPB Docket No. NY075209163 at 5-7 (June 24, 1982), the position of air traffic controller is a highly sensitive one because the incumbent is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the public who rely on him. A controller's intentional and ongoing abdication of that responsibility in order to participate in the strike, and his decision to continue striking despite the President's 48-hour grace

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[7] The Board acknowledged the importance of this factor with regard to the selection of a reasonable penalty in *Douglas, supra,* at 32.

[8] *E.g., Miller* v. *Bond,* 641 F.2d 997 at 1000 (D.C. Cir. 1981); *Bullock* v. *Mumford,* 509 F.2d 384 (D.C. Cir. 1974).

period,[9] thus constitute particularly egregious conduct which destroys the controller's unique relationship of trust with his employer.

In light of the nature and seriousness of the offense, its relation to and adverse effect on the employee's ability to perform his duties, its effect on his supervisor's confidence in that ability, and the appellant's refusal to avail himself of the 48-hour grace period,[10] the Board finds that under *Douglas, supra,* the agency's imposition of the penalty of removal cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the agency. Accordingly, the Board will not disturb the removal penalty imposed under these circumstances.

Finally, we conclude that the presiding official properly found that the removal action here was taken for such cause as will promote the efficiency of the service, as required by 5 U.S.C. § 7513(a). In our view, Section 7311 reflects the belief of Congress that discharging a Federal employee for participation in a strike against his employer promotes the efficiency of the service. In any event, the Board concludes that removal of the appellant in this case for strike participation promotes the effi-

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[9] On August 3, 1981, President Reagan announced that if the air traffic controllers did not report for duty within 48 hours, they would "have forfeited their jobs and will be terminated." *See Air Traffic Controllers Strike,* 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981). Those who had participated in the strike but who did return to work on their first scheduled shift after 11:00 a.m. on August 5 were not terminated. *See PATCO* v. *United States Department of Transportation,* 529 F.Supp. 614 (D.Minn. 1982).

[10] These and other factors are set forth in *Douglas, supra,* at 32-33. Because of the nature and gravity of the offense, its direct effect on the ability of the agency to perform its mission, and in light of the provisions of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, the Board has determined that length of service and quality of past performance are not relevant factors to be considered in the context of this and similar cases.

ciency of the service because there is a "clear and direct relationship" between such misconduct and both the "employee's ability to accomplish his . . . duties satisfactorily" and "the agency's ability to fulfill its mission." [11] *Doe* v. *Hampton*, 566 F. 2d 265, 272 n. 20 (D.C. Cir. 1977). *See also Bonet* v. *United States Postal Service*, 661 F. 2d 1071, 1978 (5th Cir. 1981); and 5 C.F.R. § 731.201.

Accordingly, the initial decision, dated May 14, 1982, is hereby AFFIRMED as MODIFIED above, and the agency's removal of the appellant is hereby SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to file a civil action in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

October 28, 1982 /s/ Herbert E. Ellingwood

October 28, 1982 /s/ Ersa H. Poston

October 28, 1982 /s/ Dennis M. Devaney

Washington, D.C.

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[11] *See* the text following footnote 7, *supra*.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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Docket Number DC075281F0895

GARY S. BARACCO

v.

DEPARTMENT OF TRANSPORTATION

## OPINION AND ORDER

Appellant timely petitioned for appeal from the action of the Department of Transportation, Federal Aviation Administration, removing him from the position of Air Traffic Control Specialist (Center), GS-2152-14, at the Washington Air Route Traffic Control Center (ARTCC), Leesburg, Virginia, effective August 24, 1981. The removal action was based on two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) absence without leave (AWOL). Both charges arose from appellant's failure to report for duty at 7:00 a.m. on August 3, 1981.

On appeal to the Board's Washington, D.C. Regional Office, appellant requested a hearing and his case was consolidated with two other similar appeals for purposes of conducting the hearing only.[1] However, appellant chose not to testify at the hearing and his designated representative did not call witnesses. Hearing Transcript (Tr.) at 142. The presiding official determined, in a separate initial decision dated November 22, 1982, that the agency established by preponderant evidence that the strike was still in progress on August 7, 1981; that ap-

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[1] *See* 5 C.F.R. § 1201.36.

pellant participated in the strike and was AWOL on the dates charged; and that he missed his deadline shift,[2] which for appellant was the shift at 7:00 a.m. on August 7, 1981. Tr. 24-25. The presiding official also found that appellant failed to show harmful error by the agency in effecting the adverse action, and that the penalty of removal could not be deemed clearly excessive or disproportionate to a sustained charge of striking, consistent with *Schapansky* v. *Department of Transportation*, MSPB Docket Number DA075281F1130 (October 28, 1982). Appellant alleged and the presiding official found, however, that the agency improperly failed to retain appellant in a duty status or a nonduty with pay status during the notice period. The presiding official, therefore, ordered the agency to correct its records to show appellant in a nonduty with pay status between August 8 and August 24, 1981, the effective date of the removal action. As so modified, the removal action was sustained.

Appellant then filed a timely motion for review of the initial decision, asserting that the presiding official erred in finding that (1) a strike was still in progress on August 7, 1981; (2) the agency proved its charges by preponderant evidence; (3) the deciding official had independent decision-making authority in removing appellant; and (4) appellant must show harmful error under 5 U.S.C. § 7701(c)(2)(A) in order to obtain reversal for the agency's error in not affording appellant "not less than 7 days" to respond to the removal proposal under 5 U.S.C. § 7513(b)(2). The agency responded in

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[2] On August 3, 1981, President Reagan announced that if the air traffic controllers did not report for duty within 48 hours, they would "have forfeited their jobs and will be terminated." *See Air Traffic Controllers Strike*, 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981). Those who had participated in the strike but who did return to work on their first scheduled shift after 11:00 a.m. on August 5, 1981, were not terminated. *See PATCO* v. *United States Department of Transportation*, 529 F. Supp. 614 (D. Minn. 1982).

opposition to appellant's petition, and filed a timely cross-petition for review seeking reversal of the presiding official's order that the agency retroactively correct its records to show appellant in a nonduty with pay status during the notice period of the removal action.

The petitions for review are hereby GRANTED under 5 U.S.C. § 7701(e)(1).

On January 18, 1983, the Board published a notice in the Federal Register, offering to accept and consider *amicus* briefs on significant common legal issues raised in related appeals of former air traffic controllers for which petitions for review are pending before the Board. That notice was open-ended as to both cases and issues. *See* 46 Fed. Reg. 2235-36 (1983). The Board has now received and considered the *amicus* briefs submitted by appellants and agencies, in addition to the submissions of the parties in this appeal.

Appellant asserts in his petition that the presiding official erred in finding that the agency proved its charges by a preponderance of the evidence. However, appellant did not present any evidence before the presiding official in this regard, and his petition does not proffer any evidence of argument to disturb the presiding official's finding that preponderant evidence supports the charge that he was AWOL from August 3, 1981, onward. Appellant's undisputed absence without leave during the strike, as well as the agency's photograph depicting him among the Professional Air Traffic Controllers Organization (PATCO) picketers, the testimony of his supervisor, Tr. 34, and documentary evidence that he was observed among the picketers at the Washington ARTCC during the week of August 3, specifically on August 4, 6, and 7, 1981, were properly found by the presiding official to be sufficient to establish a *prima facie* case of his voluntary participation in the strike. *See Schapansky, supra,* at 5-6 n.2; Initial Decision at 3. Appellant failed to rebut the agency's *prima facie* case by presenting evidence

to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to circumstances other than intentional participation in the strike. *Id.* at 6 n.2. Therefore, the Board finds no reason to reconsider the presiding official's factual determination that the agency proved its charges by a preponderance of the evidence pursuant to 5 U.S.C. § 7701(c)(1)(B).

In further regard to this issue, appellant contends that the presiding official erred in finding that a strike was still in progress on August 7, 1981. The Board held in *Ketchem* v. *Department of Transportation* MSPB Docket Number DA075281F0713 at 9 (May 28, 1982), that we take official notice of the existence of a strike by members of PATCO, beginning on August 3, 1981, and continuing through August 6, 1981. Appellant proffered no evidence in this case tending to rebut the existence of the strike on those days, and merely argues that the presiding official erred in finding that the agency showed the strike was still in progress on August 7. However, we have already found no reason to disturb the presiding official's finding that the agency proved by preponderant evidence that appellant participated in the strike and was AWOL on August 3, 4, and 7, 1981. Because two of these dates encompass the period of time for which we take official notice of the existence of the strike, the charge of participating in the strike, for at least those two days, was properly sustained.[3]

Appellant next contends that Mr. Viselli, the chief of the Washington ARTCC, who was the proposing and deciding official, had no independent decision-making authority concerning appellant's removal. Appellant submitted copies of various general notices (GENOTS)

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[3] Therefore, we need not consider whether the agency proved by direct evidence that the strike was still in progress on August 7, 1981.

issued to ARTCC chiefs, including Mr. Viselli, by agency headquarters. Appellant's Exhibits 3, 5-8. The GENOTS clarified the "grace period" during which striking air traffic controllers would be permitted to return to work without being removed, and communicated the style and substance of proposed removal notices, denials of extension of time in which to respond, and removal decision notices. Appellant claims that this evidence shows that Mr. Viselli played no substantive role in the decision-making process and that he was merely following orders from headquarters.

Mr. Viselli testified, however, that he sent letters of proposed removal only in appropriate cases, and that in twelve cases he issued notices of proposed removal but decided not to effect the removal actions because the air traffic controllers were found to have been on verified sick leave or annual leave. Tr. 103-04. The presiding official found that this evidence demonstrated that Mr. Viselli did have independent decision-making authority. Initial Decision at 6. We agree. *See Anderson* v. *Department of Transportation*, MSPB Docket No. SL075281F0428 at 8-13 (April 25, 1983).

Finally, appellant contends that the presiding official erred in requiring him to show harmful error under 5 U.S.C § 7701(c)(2)(A) in order to obtain reversal of the removal action for the agency's procedural error in not affording him the "not less than 7 days" to respond to the removal proposal provided in 5 U.S.C. § 7513 (b)(2).

In the instant case, the August 7, 1981, notice of proposed removal was sent to appellant by both regular and certified mail, and informed him that he may reply "within 7 calendar days" after receipt of the notice. The record does not reveal when, if ever, appellant received the notice sent by regular mail. However, the signed receipt for the notice sent by certified mail reflects that

appellant received that copy on August 11, 1981. On August 14, 1981, Mr. Viselli received two undated letters from appellant. In one letter, submitted "in response to the proposed removal notice," appellant stated that he could not "deny or affirm the charges at this time" and requested further information in order to answer the charges. In the second letter, appellant requested "an extension of time in which to file a written answer to the notice of proposed action." Also in the second letter, appellant requested access to all materials relied on by the agency to support the proposed removal action, and stated that he had made a separate Freedom of Information Act (FOIA) request for information concerning his case.

On the same day, August 14, 1981, Mr. Viselli sent a written reply to appellant's request,[4] stating as follows:

> Your request for an extension of time to submit a written reply beyond the seven day period is denied. You may call for an appointment to review the material relied upon to support your proposed removal. Copies of this material will be given to you at that time if you so request. You will be given a reasonable amount of time to submit a written response, as long as the response is submitted prior to August 18, 1981, the expiration of the seven day notice period. Since the material you are requesting under FOIA was not relied upon for the proposed action, search, sanitizing and copy time will not serve as the basis for any time extension.

Thereafter, neither appellant nor his designated representative submitted a further written reply to the removal proposal. On August 21, 1981, Mr. Viselli issued a decision letter finding that the charges were supported

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[4] A copy of the letter submitted into the record reflects that the same communication was also sent to appellant and his designated representative by mailgram.

by the evidence, and removing appellant effective August 24, 1981.

Appellant alleged before the presiding official that the agency denied him seven full days to reply to the notice of proposed removal in violation of 5 U.S.C. § 7513(b), because the proposal required him to respond *"within* 7 calendar days after" receipt of the proposal, and Mr. Viselli's letter denying appellant's request for an extension of time stated that a written response must be submitted *"prior to* August 18, 1981, the expiration of the seven day notice period." (Emphasis supplied.) Appellant contended that the removal proposal required him to respond before the end of the seventh day after his receipt of the notice, and that the letter denying his request for an extension of time to reply compounded the alleged error by allowing him no more than six days to reply to the notice of proposed removal.

In determining the length of time afforded an employee to respond to an adverse action proposal, the day the notice is received is not counted because it is not a full calendar day. *See Stringer* v. *United States*, 90 F. Supp. 375, 378 (Ct. Cl. 1950); 5 C.F.R. § 210.102(b)(3) and § 752.402. *See also* FPM ch. 752, subch. 3-3a(1) (Dec. 31, 1980). In this case, the reply period thus extended to the end of the seventh calendar day after appellant's receipt of the removal proposal. *See Stringer, supra*, at 378; 5 C.F.R. § 210.102(b)(3). *See also* FPM ch. 752, subch. 3-3a(2) (Dec. 31, 1980). The seventh day after appellant's receipt of the removal proposal by certified mail was August 18, 1981. Appellant clearly understood that the removal proposal afforded him seven days to respond to the proposal because in his request for an extension of time he stated that "I do not feel that, under the circumstances that apply, seven days is a reasonable time for filing a response."

The Board finds that the removal proposal, which required appellant to respond "within 7 calendar days"

after receipt of the proposal, plainly afforded him a reply period extending inclusively until the end of August 18, the seventh calendar day after his receipt of the proposal. The Board, therefore, finds that the removal proposal comported with the provisions of 5 U.S.C. § 7513 (b) (2).

Although the removal proposal correctly stated that appellant may reply within seven days after he received the notice, the presiding official found that Mr. Viselli's letter dated August 14, 1981, denying appellant's request for an extension of time to reply, was inconsistent with the removal proposal because the date set forth in the denial letter was prior to the expiration of the seven-day notice period. *See* Initial Decision at 5. Since appellant chose not to testify at the hearing, the record does not disclose whether, or the extent to which, appellant was confused or misled by the erroneous notice in Mr. Viselli's letter. The presiding official found that, even assuming the agency only provided appellant with six days to reply to the removal proposal due to the misstatement in Mr. Viselli's August 14 letter, appellant did not show that he was harmed by such error so as to require reversal of the removal action. *See* Initial Decision at 6.

Appellant argues in his petition that the agency's failure to provide him with not less than seven days to respond to the removal proposal, as provided by 5 U.S.C. § 7513(b) (2), rendered the action "not in accordance with law" under 5 U.S.C. § 7701(c) (2) (C), and requires reversal of the removal action without regard to whether the procedural error was harmful under section 7701(c) (2) (A).[5] Appellant cites the Board's decision in *Ratley*

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[5] The statute provides as follows:

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

[Continued]

v. *Department of the Army*, MSPB Docket Number AT07528110338 at 5-6 (September 17, 1982), wherein we stated:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. *See Land* v. *Federal Aviation Adminstration* [sic], MSPB Docket No. CH07528110154 at 4 (July 21, 1982). In the instant case, it is undisputed that appellant was given only 1 day to reply to the proposed suspension notice. Contrary to the presiding official, we find that a suspension taken without complying with the procedural requirements of 5 U.S.C. § 7513(b)(2) clearly constitutes harmful error under 5 U.S.C. § 7701(c)(2)(A). *Cuellar, supra*, at 12.

(Footnotes omitted.)

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[5] [Continued]

> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

5 U.S.C. § 7701(c).

Appellant's argument raises the question of whether in effecting an appealable adverse action, the failure of an agency to comply with a statutory procedure set forth in 5 U.S.C. § 7513, constitutes reversible error *per se* because the action is "not in accordance with law," or whether the effect of the error must be considered under the "harmful error" standard enunciated by the Board in *Parker* v. *Defense Logistics Agency*, 1 MSPB, 489, 492-93 (1980). *See also Devine* v. *White*, No. 81-1893, slip op. at 37-41 (D.C. Cir. January 7, 1983). The Board concludes, for the reasons set forth herein, that the "harmful error" standard is applicable in our review of agency's failure to comply with a statutory procedure provided in 5 U.S.C. § 7513. Insofar as our opinion in *Ratley* is inconsistent with this holding it is modified for the reasons set forth below.

The legislative history of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (Reform Act) is ambiguous as to the standard Congress intended the Board to apply to violations of statutory procedures. In the proposed Senate bill, agency actions were not to be reversed for procedural error unless the employee's rights were "substantially impaired." S. 2640, 95th Cong., 2d Sess. § 205 (1978). The Senate, which also drafted a section in its bill requiring reversal of agency actions which were not in accordance with law, interpreted its procedural error provision to mean that "the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced." S.Rep. No. 95-969, 95th Cong., 2d Sess. 51 (1978). *See Parker, supra*, 1 MSPB at 492. Since some of the employee rights referred to by the Senate were statutory procedural rights, it is clear that adverse actions were not to be reversed merely because there was a violation of a statutory procedure. The House, however, without explanation, substituted the harmful error

standard for the Senate's "substantial impairment" test. H. Rep. No. 95-1403, 95th Cong., 2d Sess. 22 (1978). When this language, together with the "not in accordance with law" provision, was adopted by the Conference Committee and enacted into law without explanation, the present uncertainty over the application of harmful error to statutory procedural rights resulted.

The ambiguity caused by the legislative history of the Reform Act, however, can be resolved by applying the rules of statutory construction. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 412 n.29 (1971). One of the primary rules of statutory construction is that effect must be given to every word, clause, and sentence of a statute, if at all possible, so that no provision will be superfluous, inoperative, or insignificant. *American Radio Relay League* v. *Federal Communications Commission*, 617 F.2d 875, 879 (D.C. Cir. 1980). This rule cannot be logically complied with if the Board accepts the proposition that statutory procedural errors should be analyzed under the "not in accordance with law" standard. This is true because it is well settled that reasonable and properly promulgated regulations, as well as statutes, have the force and effect of law. *See Pearce* v. *Department of Labor*, 647 F.2d 716, 726 (7th Cir. 1981); *Jackson* v. *United States*, 573 F.2d 1189, 1194 (Ct. Cl. 1978). Consequently, if the Board reviews statutory violations under the "not in accordance with law" standard, logically we also must review regulatory violations under that standard. Such a result would render the harmful error provision meaningless since no procedural violations would then be subject to it.

In our view, the way to give meaning to both of these sections is to read the "harmful error" provision as applicable to all procedural errors and to read the "not in accordance with law" provision as applicable to other unlawful actions. This reading of the statute is consistent with the reviews expressed in the legislative history of

the Reform Act, S. Rep. No. 95-969, 95th Cong., 2d Sess. 51 (1978), and is responsive to the numerous expressions of concern during hearings on the Reform Act about the unnecessary procedural reversals of agency actions. *See Hearings Before the Senate Committee on Governmental Affairs on S. 2640, S. 2707 and S. 2830*, 95th Cong., 2d Sess. 22, 43, 101, 146 (1978); *Hearings Before the House Committee on Post Office and Civil Service on H.R. 11280*, 95th Cong., 2d Sess. 31, 122-23 (1978). *See also Parker, supra*, 1 MSPB at 492 n.4. The Board concludes, therefore, that agency procedural errors in arriving at decisions in cases appealable to the Board are subject to review under the "harmful error" standard of 5 U.S.C. § 7701(c)(2)(A).

In considering the effect of the procedural errors under 5 U.S.C. § 7513, the Board has consistently focused on whether the employee's ability to defend against the adverse action was impaired by the error, or whether the error otherwise had a likely effect on the agency's action so as to constitute harmful error under 5 U.S.C. § 7701(c)(2)(A).[6] More particularly, we have held that an

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[6] *See, e.g., Hockman* v. *American Battle Monuments Commission*, MSPB Docket Number SF07528110757 at 3-4 (July 30, 1982) (the agency's failure to afford the appellant his right to make an oral reply to the removal proposal under 5 U.S.C. § 7513(b)(2) was procedural error, but the appellant failed to show that in the absence of the procedural error, the outcome before the agency was likely to have been different or that his substantive rights were otherwise adversely affected); *Ware* v. *Department of Education*, MSPB Docket Number SF07528010323 at 4-5 (July 30, 1982) (the appellant waived his right to reply orally and in writing to the removal proposal under 5 U.S.C. § 7513(b)(2), and even if the agency erroneously prevented the appellant from making a reply, he did not show that in the absence of such procedural error the agency might have reached a conclusion different from the one reached); *Gallego* v. *Department of the Navy*, MSPB Docket Number SF07528110759 at 2-3 (July 21, 1982) (the agency's shortening of the thirty-day advance notice requirement of 5 U.S.C. § 7513(b)(1) by seven days was error, but the error did not warrant reversal of the removal action); *Swindell* v. *Veterans Administra-*

agency's failure to afford an employee the not less than seven days required by 5 U.S.C. § 7513(b)(2) to answer the charges is not cause for reversal absent a showing of harmful error by the employee. *See Johnson v. Department of the Treasury*, MSPB Docket Numbers DC075209213 and DC075209214 at 4-5 (August 27, 1982) (the agency's shortening of the seven-day reply period provided by 5 U.S.C. § 7513(b)(2) to six days was error, but the employee failed to demonstrate that her ability to present her case was prejudiced or that

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*tion*, MSPB Docket Number NY07528110114 (June 14, 1982) (the appellant did not show that the agency's failure to require the officials who heard his oral reply under 5 U.S.C. § 7513(b)(2) to recommend a final decision on the proposed adverse action constituted harmful error); *Messersmith* v. *General Services Administration*, MSPB Docket Number DC07528010253 at 2-3 (December 2, 1981) (the appellant waived his right to make an oral reply under 5 U.S.C. § 7513(b)(2) to the removal proposal, and even if the Board were to find that a request was made and erroneously denied, the Board could not find that the procedural error was likely to have had a harmful effect upon the outcome before the agency so as to constitute harmful error); *Cade* v. *U.S. Postal Service*, MSPB Docket Number SF07528010370 at 2 n.2 (November 24, 1981) (the agency's provision of only twenty-six days' notice instead of the thirty days' notice required by 5 U.S.C. § 7513(b)(1) was error, but because the appellant replied to the charge against him within the time he was permitted and he adduced no evidence that a longer notice period would have allowed him to prepare a more persuasive reply, the agency's error did not warrant reversal of the action); *Graham* v. *U.S. Postal Service*, 2 MSPB 377, 380-82 (1980), *petition for review denied sub nom. Graham* v. *Merit Systems Protection Board*, 681 F.2d 806 (3d Cir. 1982) (the agency's failure to maintain and furnish to the Board a summary of the appellant's oral answer to the charges as provided by 5 U.S.C. § 7513(e) constituted a procedural error but the appellant failed to demonstrate that this error likely affected the result of the agency's action on the removal proposal so as to require reversal); *Hunger* v. *Department of the Interior*, 2 MSPB 274 (1980) (the agency's advance notice of the charges as provided by 5 U.S.C. § 7513(b) was sufficiently specific to afford the appellant an opportunity to defend against the proposed charges so that harmful error did not occur).

the error would likely have affected the agency's decision to effect the emergency suspension action). Similarly, the Court of Claims held in a case arising before passage of the Reform Act that an agency's issuance of its final decision in an adverse action, after receipt and consideration of the employee's answer, but prior to the expiration of the notice period, does not of itself invalidate the final decision or the notice thereof. *Palmer* v. *United States*, 121 Ct. Cl. 415, 419-21, *cert. denied*, 344 U.S. 842 (1952). *See also Johnson*, *supra*, at 4 n.1.

In *Ratley*, *supra*, the Board stated that an agency's allowance to an employee of only twenty-six hours to reply to a proposed suspension during the notice period of a removal action was "not in accordance with law." [7] *Ratley*, *supra*, at 5. Our ultimate determination in *Ratley*, however, was based on a finding that a proposed suspension effected after affording the employee only one day to reply constituted harmful error under 5 U.S.C. § 7701(c)(2)(A). *Id.* at 6. The reversal of the suspension in *Ratley* was not based on a finding that the decision was not in accordance with law under section 7701(c)(2)(C), although there is a statement to that effect, but upon a finding of harmful error under section 7701(c)(2)(A) because the mere one-day reply period afforded the employee, who had requested an extension of time to obtain statements from his doctors in response to the proposed suspension, substantially impaired his ability to defend against the agency action.

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[7] *Ratley* cites *Land* v. *Federal Aviation Administration*, MSPB Docket Number CH07528110154 at 4 (July 21, 1982), where the Board stated in dicta that the failure to afford seven days to respond is "not in accordance with the law." However, we found in *Land* that the agency complied with the minimum seven-day response period of 5 U.S.C. § 7513(b)(2), and we reversed the initial decision and remanded the case to the Regional Office for a decision on the merits because we found, contrary to the presiding official, that the agency properly invoked the "crime provision" to shorten the thirty-day notice period required by 5 U.S.C. § 7513(b)(1). *Land* at 3-5. Thus, our holding in *Land* provides no support for appellant's argument.

Similar to the Board's application of the "harmful error" standard to agency procedural violations, the Court of Claims has held, upon examination of the legislative history of the Reform Act, that reversal of agency adverse actions by the Court under 5 U.S.C. § 7703, for procedural error by an agency, is appropriate "only if the procedures followed substantially impaired the rights of the employees." *Doyle* v. *Veterans Administration*, 667 F.2d 70, 72 (Ct. Cl. 1981); *Brewer* v. *United States Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982). This standard of review has also been expressly adopted by the Court of Appeals for the Federal Circuit. *See Shaw* v. *United States Postal Service*, No. 56-81, slip op. at 4 (Fed. Cir. January 13, 1983) (procedural errors can vitiate an agency decision only if they are "harmful" under 5 U.S.C. § 7701 (c)(2)(A), and to be deemed "harmful" the error must substantially impair the employee's rights). *See also Devine, supra*, slip op. at 39-40; *Sears* v. *Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982).

In light of these considerations, the Board holds that the procedural error of an agency in failing to afford an employee with the not less than seven days to respond to a written proposal of an appealable adverse action provided by 5 U.S.C. § 7513(b)(2) does not warrant reversal of the action unless the employee shows by a preponderance of the evidence [8] that the procedural error likely had a harmful effect upon the outcome before the agency. *Parker, supra*, 1 MSPB at 493. *See also Devine, supra*, slip op. at 39-41; *Johnson, supra*, at 4.[9]

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[8] *See Pinto* v. *Department of Labor*, MSPB Docket Number DE07528010140 at 2 (May 11, 1982) (the proper standard for proving affirmative defenses, including an assertion of harmful error, is by a preponderance of the evidence).

[9] The Board has recognized, however, that an agency's complete failure to provide any of the procedural protections of 5 U.S.C. § 7513 in effecting an adverse action constitutes harmful error. *See,*

The record in the instant case reveals that appellant was afforded at least six days in which to reply to the removal proposal. In fact, appellant submitted two letters during this period to Mr. Viselli, the proposing and deciding official, which he construed to constitute appellant's written reply. Tr. 133-36; Removal Decision Letter dated Agust 21, 1981. Although appellant contends that the agency clearly erred in this regard, he did not demonstrate before the presiding official, nor has he shown in his petition for review, that his ability to present his case was prejudiced because he was afforded only six days to respond to the removal proposal rather than the not less than seven days provided by 5 U.S.C. § 7513(b)(2). Nor at any level of his appeal has appellant proffered any arguments that he would have made, or evidence that he would have presented, in reply to the removal proposal or shown how such arguments would likely have affected the agency's decision.

The Board finds that the shortening of the reply period to less than seven days was error.[10] The Board finds,

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*e.g., Kerr* v. *National Endowment for the Arts*, 5 MSPB 299 (1981); *Morrow* v. *Department of the Army*, 4 MSPB 494, 497 (1980); *White* v. *Department of the Treasury*, 4 MSPB 11, 13 (1980). This is because an agency's total failure to follow any of the procedures of section 7513 impairs an employee's ability to defend against an adverse action and otherwise affects the outcome before the agency. *Cf. Horne* v. *Merit Systems Protection Board*, 684 F.2d 155 (D.C. Cir. 1982); and *Wright* v. *Federal Aviation Administration*, MSPB Docket Number DC07528010413 (July 21, 1982) (an agency's reduction-in-force (RIF) action may not be affirmed based on how the agency might have acted had it followed proper RIF procedures, and the agency's actions in demoting the employees without following any formal RIF procedures was improper and reversible).

[10] Appellant's petition does not now seek review of the presiding official's determination that the seven-day minimum reply period of section 7513(b)(2) afforded by the agency's removal proposal was reasonable. Mr. Viselli gave unrebutted testimony that he carefully considered and discussed with the agency's legal staff appel-

however, that appellant has not shown by a preponderance of the evidence that the agency committed procedural error which likely had a harmful effect upon the outcome before the agency so as to warrant reversal of the removal action. *Parker, supra,* 1 MSPB at 493.

Finally, appellant alleged and the presiding official found that the agency improperly failed to retain appellant in a nonduty status with pay during the notice period of the removal action, from August 8 through August 24, 1981. *See* Initial Decision at 7-8. The agency has petitioned for review of the presiding official's determination in this connection. The record shows that the agency did not pay appellant for his absence beginning August 3, through August 24, 1981. Mr. Viselli testified that he never considered retaining appellant in a duty or pay status, Tr. 127, and that, without appropriate justification for his absence, appellant would not have been permitted to work once he missed his deadline shift. Tr. 119. However, at no time throughout the removal process did appellant personally contact Mr. Viselli. Tr. 66, 117. Further, the record is devoid of any evidence indicating that appellant attempted to return to work during the notice period or that he contacted the Washington ARTCC to express his desire to return to work. The Board finds that the agency properly maintained appellant in a non-pay status during the notice period of the removal action. *See Martel* v. *Department of*

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lant's request for an extension of time to reply. Tr. 127. Although appellant's request was denied, Mr. Viselli testified that some extensions were granted. Tr. 128. Appellant has not presented any evidence that his defense would have been more complete if given more time, and he has not shown what more could have been presented to the agency if he had been granted an extension of time to respond. Therefore, the Board finds no reason to disturb the presiding official's determination that under these circumstances the seven-day minimum reply period afforded by the removal proposal was reasonable. *See Land* v. *Federal Aviation Administration,* M3PB Docket Number CH07528110154 (July 21, 1982).

*Transportation*, MSPB Docket Number BN075281F0558 at 11-12 (April 25, 1983).[11]

Accordingly, the Initial Decision of the presiding official is hereby AFFIRMED as MODIFIED by this Opinion and Order, and appellant's removal is hereby SUSTAINED. The order of the presiding official as to the pay status of appellant during the removal notice period is hereby VACATED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after appellant's receipt of this order.

April 25, 1983 (Date) /s/ Herbert E. Ellingwood,
HERBERT E. ELLINGWOOD
Chairman

April 25, 1983 (Date) /s/ Ersa H. Poston,
ERSA H. POSTON
Vice Chair

April 25, 1983 (Date) /s/ Dennis M. Devaney,
DENNIS M. DEVANEY
Member

Washington, D.C.

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[11] Appellant generally raised the constructive suspension issue at the hearing and did not file a timely petition for appeal of the alleged adverse action. However, appellant did not present any evidence to show that he unequivocally notified the agency of his readiness, willingness, and ability to return to work. *Martel, supra*, at 11-12. Appellant, therefore, was not affected by an appealable suspension action and the issue of whether the Board has jurisdiction over a suspension during an advance notice period, when the matter is first raised subsequent to filing a petition for appeal, need not be addressed here.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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Docket Number NY075281F0424

RICHARD T. ADAMS, *et al.*[1]

v.

DEPARTMENT OF TRANSPORTATION

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## OPINION AND ORDER

Appellants were removed from their positions as Air Traffic Controller Specialists at the New York Air Traffic Control Center in Ronkonkoma, New York. Their removals were based on charges of: (1) striking against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence (absence without leave or AWOL). Appellants petitioned for appeal of their removals to the New York Regional Office of the Board. Their appeals were consolidated by the presiding official designated to hear their appeals pursuant to 5 U.S.C. § 7701(f) and 5 C.F.R. § 1201.36(b).

With respect to each appellant, the presiding official found in a consolidated initial decision rendered on October 14, 1982, that the agency charges were supported by a preponderance of the evidence and that the penalty of removal was either mandated by statute or appropriate in light of the offenses. He therefore sustained the agency actions. However, as to then appellant William

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[1] The appellants affected by the terms of this Opinion and Order are listed by name and MSPB Docket Number in Appendix A to this Opinion.

Copping, the only former air traffic controller who testified at the hearing, the presiding official found that the charge of participating in a strike against the Federal government was not sustained. The agency does not further contest the finding.[2]

Appellants' petitions for review of the initial decision are based on numerous contentions of harmful error by the presiding official. Appellants further argue that the presiding official erred in finding that they had participated in a strike and that their removal on that charge promoted the efficiency of the service. The Board hereby GRANTS review under 5 U.S.C. § 7701(e)(1). Each contention raised by appellants will be addressed herein.

On January 18, 1983, the Board published a notice in the Federal Register, offering to accept and consider *amicus* briefs on significant common legal issues raised in related appeals of former air traffic controllers for which petitions for review are pending before the Board. That notice was open-ended as to both cases and issues. *See* 48 Fed. Reg. 2235-36 (1983). The Board has now received and considered the *amicus* briefs submitted by appellants and agencies, in addition to the submissions of the parties in this appeal.

## I. *Issues Common to all the Appellants*

Appellants contend that certain of the agency's actions during the course of the proceedings in their appeals, coupled with the presiding official's rulings, or lack

[2] The presiding official found that appellant Copping was on sick leave prior to the strike, and he was still sick on the days he was charged with striking, although his sick leave had expired. The presiding official, therefore, found that preponderant evidence did not support the charge of striking. The presiding official found, however, that appellant Copping was shown to be AWOL on the days charged because he had no accrued leave at that time. The presiding official found that under all the circumstances of appellant Copping's case, a three-day suspension was the maximum reasonable penalty for his offense.

thereof, demonstrate bias on the part of the presiding official; a failure to afford them a speedy determination of their appeals; and generally amount to a denial of appellants' procedural due process rights.

Initially, appellants complain that the failure of the agency to respond to the initial petition for appeal within fifteen (15) days as provided for in 5 C.F.R. § 1201.22 (b) constituted prejudical error. While it is true the agency did not respond and/or submit the agency files in these matters within the normal time frame, there is no showing by appellants concerning how this denied their right to a hearing or prejudiced their ability to defend against the agency's adverse actions in their cases. *See Conner* v. *U.S. Postal Service*, 5 MSPB 194, 195 (1981); *Lawrence* v. *District of Columbia Government*, 4 MSPB 370 (1980). We therefore find that argument to be without merit.

Appellants next contend that the agency engaged in dilatory tactics during the discovery stage of the proceedings, and that the presiding official's failure to impose sanctions against the agency for such conduct constituted reversible error. The imposition of sanctions under 5 C.F.R. § 1201.43(a), for failure to follow Board discovery orders, is a matter for the presiding official's sound discretion, where the ends of justice require it, *Stone* v. *Office of Personnel Management*, 5 MSPB 142, 143 (1981), and absent a showing that such discretion has been abused, the presiding official's determination will not be found to constitute reversible error. *Lawrence* v. *District of Columbia Government, supra. See Ragland* v. *Internal Revenue Service*, 6 MSPB 565, 566 (1981); *Karapinka* v. *Department of Energy*, 6 MSPB 114, 116 (1981). In determining whether the imposition of sanctions is warranted against a party, the Board has determined that factors to be considered include a party's diligence or lack of it, or a party's good faith effort to comply with the order of the presiding official. *See, e.g.,*

*Venable* v. *Department of Transportation*, MSPB Docket No. NY075281F1254 at 3 (December 23, 1982).

Against this legal back drop, the special circumstances of the approximately 11,000 related air traffic controller (ATC) appeals can and should be recognized. During the spring of 1982, discovery was being accomplished at the national, regional, and individual levels. The Board has reviewed the record and finds no indication that the agency responses to Orders entered by the presiding official were made significantly out of time or otherwise served to prejudice the reasonable, expeditious resolution of these cases. Furthermore, at the pre-hearing conference concerning the instant cases, both parties complained of the other's alleged failure to timely and adequately engage in discovery. *See, e.g.*, Hearing Transcript (H.T.) 13-20. The Board does not conclude that the presiding official's pre-hearing management of the cases or the agency's conduct of the cases as a party have been shown to have caused any prejudicial harm to appellants' presentation of their cases.

Finally, appellants object to the presiding official's failure to allow a late filing of their post-hearing brief. At the conclusion of the hearing, the presiding official clearly indicated the time schedule for the filing of such pleadings. H.T. 214-15. No submissions were received from appellants within this time frame or before the initial decision was issued on October 14, 1982. Shortly thereafter, appellants (on October 18 and again on November 3) moved for the first time to extend the time for filing, citing mechanical breakdowns of office equipment and failure to obtain the transcript of the proceedings.[3] We note that there is no claim and no evidence that appellants' counsel contacted the presiding official to explain these circumstances or otherwise request an ex-

[3] The presiding official denied those motions in Orders dated October 28 and November 15, 1982.

tension of time prior to issue of the initial decision. Furthermore, the Board's review of the pleadings in question leads us to conclude that they are substantially similar to the petitions for review filed in the instant cases. Thus, any harm that might have befallen appellants based on the presiding official's ruling on these motions is mooted by our consideration of the petitions for review, and we discern no abuse of the presiding official's discretion in setting the time limits for filing post-hearing briefs. *Miller* v. *Department of the Air Force*, MSPB Docket No. BN075209070 at 3 (November 30, 1981). *See Oliver* v. *Department of Transportation*, 1 MSPB 368, 371 (1980). We can therefore discern no reversible error in the presiding official's conduct of the proceedings in these cases.

Appellants' contentions that the presiding official's rulings indicate bias in favor of the government are without merit. As the Board stated in *Bandy* v. *Department of the Navy*, 4 MSPB 295 (1980), an appellant's contentions concerning the alleged bias of the presiding official which represent no more than a disagreement with his analysis of the facts, and/or an assertion that he incorrectly ruled on certain objections to the introduction of evidence made by appellant's representative at the hearing, are clearly insufficient to establish bias. *See Oberman* v. *U.S. Postal Service*, MSPB Docket No. NY075209139 at 2-3 (September 2, 1982), and the cases cited therein.

Appellants next contend that various actions by the agency which occurred during the processing of appellants' removals at the agency level constituted harmful procedural error, and were not in accordance with law, thus requiring reversal of the actions under 5 U.S.C. §§ 7513(b) and 7701(c)(2)(A) and (C).

Appellants first argue that the absence of proof of arrest or indictment of the individual appellants for vio-

lation of 18 U.S.C. § 1918 renders improper the agency's invocation of the so-called "crime provision" of 5 U.S.C. § 7513(b)(1) to shorten the notice period to seven days. In *Schapansky* v. *Department of Transportation*, MSPB Docket No. DA075281F1130 at 7-8 (October 28, 1982), the Board held that none of these factors are strict prerequisites to a finding of "reasonable cause to believe" that a crime punishable by imprisonment has been committed sufficient to justify the use of the crime provision. We found in *Schapansky* that because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because appellant was absent from work during the strike and was among the picketers, the agency had reasonable cause to believe that the appellant committed a crime for which a sentence of imprisonment might be imposed.

In the hearing on appeal, Tower Chief Lewis Pol admitted that he did not know what appellants' subjective intent may have been in withholding their services from their employer on the dates in question. H.T. 101. Nonetheless, at the time he took steps to implement the removals of the appellants, Chief Pol knew that:

1) approximately 85% of his normal workforce was absent without leave, H.T. 72-73;

2) picketing by PATCO members claiming to be on strike was being engaged in at his facility, H.T. 75-76;

3) each of the appellants was absent without leave during that time and none of the individual appellants had contacted the facility either to request sick leave or to otherwise explain the circumstances of their absence, H.T. 70, 86; and

4) until the "deadline" shift began,[4] each of the appellants would have been permitted to return to duty. H.T. 111-12.

We conclude that under the totality of the circumstances Chief Pol's determination that the individual appellants were striking in violation of 18 U.S.C. § 1918 and 5 U.S.C. § 7311 was both reasonable and supported by a preponderance of the evidence. His determination, therefore, fits within the guidelines set forth by the Board in *Schapansky, supra,* at 7-8, and waiver of the 30-day notice period provided in 5 U.S.C. § 7513(b) did not violate appellants' statutory procedural rights or constitute error in the application of the agency's procedures.

Appellants next urge that all of their removals were harmfully defective procedurally based on two distinct terms in the wording of the letters sent notifying them of the imminent possibility of their removal. First, it is argued that the fact they were informed that they could respond "within" seven days of receipt of the removal proposal letter, as a matter of fact and/or law requires a finding they were afforded less than seven days in which to respond. 5 U.S.C. § 7513(b)(2).

None of the appellants in the instant cases claim to have attempted to make an oral response to the charges against them. None of their written replies gave any reasons for their failure to report for duty on the dates in question. Nonetheless, all of their written responses were received and apparently considered by the agency in determining whether to remove them. H.T. 86.

The Board held in *Baracco* v. *Department of Transportation* MSPB Docket No. DC075281F0895 at 8-9

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[4] "Deadline" shift refers to the first scheduled shift an air traffic controller was to report for after 11:00 a.m., Eastern Daylight Time, August 5, 1981.

(April 25, 1983), however, that the agency's removal proposal, which required the appellant to respond "within 7 calendar days" after receipt of the proposal, plainly afforded a reply period extending inclusively until the end of the seventh calendar day after the appellant's receipt of the proposal, and comports with the provisions of 5 U.S.C. § 7513(b)(2). The Board therefore finds that appellants in these cases have not shown that the agency erred in this regard. There is evidence that appellants so construed the notice to provide seven days to respond when each requested an extension of time in which to respond (which requests were denied by the agency), stating, "I do not feel that, under the circumstances that apply, *seven days* is a reasonable time for filing a response." (Emphasis supplied.) Agency files, tab 5.

Appellants' second attack on the proposal notice centers on the agency's use of the word "intend" in the notice as demonstrating a pre-ordained decision to remove them. While appellants describe this as the agency's "most egregious error," they do not suggest what wording might be considered appropriate.

The purpose of notification of the charges to an employee against whom adverse action is proposed is to provide the employee with "a fair opportunity to oppose his removal" by informing him of the reasons for the proposed action "with sufficient particularity to apprise him of allegations he must refute or acts he must justify." *Burkett* v. *United States*, 402 F.2d 1002, 1004 (Ct. Cl. 1968). *See also Johnson* v. *Department of the Treasury*, MSPB Docket Nos. DC075209213 and DC07520914 at 5 (August 27, 1982); *Hendricks* v. *Department of the Interior*, MSPB Docket No. SF07528090167 at 3 (February 23, 1982). The letter sent by the agency specifically and adequately informed appellants that their continuing unexcused absence in the context of a national strike against the Federal gov-

ernment served as the basis for the proposed or "intended" action. Furthermore, Chief Pol testified, without rebuttal, that although if an employee were found to be on strike, removal would be accomplished, H.T. 94, air traffic controllers found not to have been in fact striking after issuance of the proposal were not removed. This occurred both throughout the country and at the New York Air Traffic Control Center. Response to ALJ-1, Appendix I (May 20, 1982), file tab 9.

The Board cannot conclude that the wording of the proposal lacked sufficient particularity to apprise appellants of their rights to respond to the charges so as to constitute harmful procedural error. *See Johnson, supra,* at 5; *Plath* v. *Department of Justice,* MSPB Docket No. BN07528110071 at 3 (July 15, 1982); *Hendricks, supra,* at 3.

Appellants also contend that the agency committed clear harmful error in its failure to follow the guidelines set forth in a June 4, 1980, memorandum from then Attorney General Benjamin Civiletti. App. Exhb. C.[5] The Board finds that appellants have misconstrued both the effect and the applicability of that memorandum on the circumstances of these and similar cases.

The presiding official found that the memorandum constituted advisory guidance and did not establish nondiscretionary policy under which the agency operates and which has the effect of a regulatory requirement in addition to those of 5 C.F.R. Part 752. Initial Decision at 5. *Compare Giesler* v. *Department of Transportation,* 3 MSPB 367, 368 (1980) (the Board held that the provi-

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[5] The memorandum was issued to the heads of all departments and agencies in the Executive Branch. It is described in the covering material as providing "guidelines . . . to personnel and your staff concerning procedures to be followed in administrative investigations," and states it was "developed as a result of inquiries from a number of federal agencies."

sions of a collective bargaining agreement establish non-discretionary policy under which an agency operates and have the effect of regulatory requirements, in addition to those of 5 C.F.R. Part 752). In *Gertzman* v. *Immigration and Naturalization Service*, MSPB Docket No. NY07528110094 at 2 (January 19, 1982), the Board held that an agency's table of penalties is merely a guide and is not mandatory. *But cf. Gilliam* v. *Department of Commerce*, 6 MSPB 59, 60 (1981) (agency circular establishing an employee assistance program represented guiding principles and established non-discretionary policy under which the agency operated and which have the effect of regulatory requirements). The Board finds that appellants have not shown that the presiding official erred in determining the memorandum in this case constituted advisory guidance.

More significantly, however, appellants' situation simply does not reach a custodial interrogation similar to that contemplated by the memorandum's guidance. The memorandum addresses itself to situations where, "a Department or agency considers it necessary to obtain or induce the cooperation of their employees in administrative misconduct proceedings . . . ." It goes on to to state as follows:

> Most administrative misconduct hearings involve situations where, under agency regulations, an employee is merely provided an opportunity to respond to questions concerning job-related misconduct. However, on occasion the cooperation of an employee . . . is deemed essential enough that the employee should be required to answer questions concerning his job-related misconduct or face dismissal for not cooperating. In this latter situation, any statement which the employee provides concerning job-related misconduct would be considered 'compelled' for Fifth Amendment purposes . . . However, where an employee is merely afforded an opportunity to respond

> to a charge of misconduct, any statements made by him would not be 'compelled' for Fifth Amendment purposes . . . .

In the instant cases, the agency did have reasonable cause to believe a crime had been committed by appellants. *See Schapansky, supra,* at 7-8. However, in responding to the charges, appellants were free to deny such activity on their part. They chose not to do so. They were not compelled to answer within the description of the memorandum. Furthermore, as alluded to in the initial decision, any admission made by appellants without the benefit of advisement of their constitutional right to remain silent would have been excluded as evidence in any subsequent criminal prosecution. *Garrity* v. *New Jersey,* 385 U.S. 493 (1967). *See Weston* v. *Department of Housing and Urban Development,* MSPB Docket No. NY07528210194 at 4-5 (January 7, 1983); *Ashford* v. *Department of Justice,* 6 MSPB 389, 393 (1981). The Board finds that the memorandum's effect is advisory and inapplicable to the instant cases.

Appellants next contend that the agency "has not met its burden of proof." Appellants urge that absence during a strike is insufficient to show intent on their part to participate in the strike. Apparently conceding the controlling nature of *Schapansky, supra,* appellants seek to distinguish that case by pointing out that in the record of these cases there was no direct evidence of their appearance on the picket line nor any admission by appellants that they were "protesting" or had voted for a strike. *See Schapansky, supra,* at 5-6. However, the Board stated in *Schapansky* at 6 that, "it is an employee's voluntary withholding of services in concert with others, and not his physical presence on a picket line, which constitutes the gravamen of such a charge." *See Tennessee Valley Authority* v. *Bailey,* 495 F. Supp. 711, 712 (E.D. Tenn. 1980). The Board finds that the unrebutted testimony of Chief Pol was sufficient to estab-

lish a *prima facie* case of appellants' participation in the strike within our holding in *Schapansky*.

In his initial decision, the presiding official drew an adverse inference from appellants' failure to testify at the hearing. Initial Decision at 4. While appellants claim in their petition for review that he improperly drew an adverse inference from their failure to reply completely to the charges, the initial decision clarifies that this was not the presiding official's ruling or intent. Initial Decision at 4 n.2.

In *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), the Supreme Court held that while silence, in and of itself, is insufficient to support disciplinary action, it is permissible to draw an adverse inference from a party's silence in the face of evidence that incriminates him. As noted above, the agency in this case provided probative evidence that appellants were participating in a strike and absent without authorization. Thus, the presiding official's decision to draw an adverse inference was not improper. Additionally, the Board has held that an appellant's exercise of his fifth amendment right not to testify does not preclude a presiding official from drawing an adverse inference from that refusal. *Book* v. *U.S. Postal Service*, 6 MSPB 322 (1981), *aff'd*, 675 F.2d 158 (8th Cir. 1982).

In the instant cases, it is clear that the presiding official found that the agency had presented a *prima facie* case of strike participation, and that appellants' refusal to testify or otherwise offer rebuttal evidence was preceded by the introduction of probative evidence by the agency. Accordingly, the Board does not conclude that the presiding official erred in considering appellants' failure to attempt to rebut the charges. Whether his reasoning is construed as being a finding of an unrebutted *prima facie* case under *Schapansky*, or drawing of an adverse inference under *Book*, appellants have not shown that the presiding official's conduct constituted reversible error.

Finally, appellants assert that certain actions of Chief Pol at or about 11:00 a.m., Eastern Daylight Time, on August 5, 1981, served to render them "locked out" of the facility. Chief Pol testified that he made a short address over the public address system. He testified as follows:

> Q Tell me what you said, Mr. Pol.
>
> A I think the essence of what I said was I started with "This is the chief speaking, I'm sure you are all aware of the President's deadline of 11:00 a.m., if any of you wish to report for work, report to the guard shack and you will be escorted into the facility" or "sign in and you will be escorted into the facility" or "sign in and you will be escorted into the facility." I think that's pretty close.
>
> Q Now what arrangements did you make to permit these people access at that time?
>
> A As I said, go to the guard shack, sign in and you'll be escorted into the facility. We had every procedure in mind about how we were going to handle it.
>
> Q Okay, isn't it true, sir, that the gates were locked?
>
> A Not at that time they weren't, no.

H. T. at 111-12. Viewed in a light most favorable to appellants, the most that can be found from these circumstances is that anyone within hearing distance of the announcement (which appellants do not claim to have been) was specifically informed not that he or she could not return to work, but rather that he or she could.

In *Campbell* v. *Department of Transportation*, MSPB Docket No. DE075281F0674 at 17 (April 25, 1983), we held that, in order for an illegally striking appellant to

have availed himself of the Presidential amnesty offer, he was required to timely notify the agency of his readiness and desire to abandon the strike and to return to work. We also found that it was incumbent on the appellant to seek any necessary clarification from the agency with respect to his individual "deadline shift." We specifically rejected the contention that the appellant was relieved of those responsibilities based on his allegations of confusion regarding his individual deadline and employment status, and ensuing belief that he had already been discharged.

In that regard, we found that cases applying the futility rule to protect legally striking private sector employees are inapplicable to Federal employees illegally striking in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918. *Campbell, supra*, at 17. We found, further, that even if those private sector cases were directly applicable, they apply the futility rule only where the employee's failure to timely notify his employer of his readiness to abandon the strike, and return to work, was caused by confusion or mistake generated by acts of unfair labor practice committed by the employer, unlike the circumstances in *Campbell*. In light of the undisputed testimony that each appellant could have returned to work prior to his "deadline shift" and that none of the appellants attempted to do so or otherwise contacted the facility, the Board cannot conclude that Chief Pol's statements served to "lock-out" any or all of the appellants herein. *See Campbell, supra*, at 17.

Appellants challenge the initial decision's conclusion that the requisite nexus between the conduct proven by the agency and the "efficiency of the service" exists. In *Schapansky, supra*, at 11-12, the Board held that 5 U.S.C. § 7311 reflects the belief of Congress that discharging a Federal employee for participation in a strike against his employer promotes the efficiency of the service. The Board concluded that removal of the appellant for strike

participation promotes the efficiency of the service because such misconduct affects both the employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its mission.

In these cases, appellants' conduct, at least in part, occurred precisely when they were scheduled for duty and failed to appear. Chief Pol testified without rebuttal, that appellants' action in withholding their services had a significant negative operational impact on the facility's ability to perform its mission (*i.e.*, controlling aircraft in the required manner considering safety and other concerns). H.T. 77. An operational emergency was declared, H.T. 89, and the significant disruptive effect of appellants' activity on the national air traffic control system has been noted and discussed in numerous related litigative proceedings. *See Schapansky, supra*, at 11-12; *Ketchem* v. *Department of Transportation*, MSPB Docket No. DA075281F0713 at 4-5 (May 28, 1982).

Nothing set forth by appellants in their petition for review serves to distinguish these cases from the situation ruled on by the Board in *Schapansky*. We find, accordingly, that the presiding official properly found that the agency proved the requisite nexus between appellants' conduct and the efficiency of the service. Nonetheless, appellants contend that under the Board's decision in *Douglas* v. *Veterans Administration*, 5 MSPB 313 (1981), the agency has failed to sustain its burden of demonstrating that the penalty of removal is not "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." *Id.* In this regard, the presiding official found that the penalty of removal was within the parameters of reasonableness for appellants' offenses.

After issuance of the initial decision in these cases, the Board reviewed similar claims by former air traffic controller appellants in *Schapansky, supra*, and *McPart-*

*land* v. *Department of Transportation*, MSPB Docket No. DA075281F1018 (February 8, 1983). In *Schapansky*, at 10-11, the Board found that under *Douglas*, *supra*, the agency's imposition of a removal penalty on an air traffic controller cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the Federal government, despite many years of government service or a flawless prior employment record. The nature and gravity of such an offense and its direct effect on the agency's ability to perform its mission far outweigh such otherwise mitigating factors. *Schapansky*, *supra*. Therefore, the Board will not disturb the removal penalty imposed by the agency in these appeals. *See McPartland*, *supra*, at 7-8.

II. *Issues Peculiar to Individual Appellants*

Appellant Brennan was charged with striking and AWOL commencing on August 3, 1981. His notice of proposed removal was sent August 8.[6] Appellant's time and attendance report (FAA Form 2730-68) indicates that he was considered AWOL on August 3, 4, 5, 6, and the 11:00 p.m. through 7:00 a.m. shift of August 7-8. However, there is other evidence of record demonstrating that the agency's placing him in an AWOL status cannot be supported by a preponderance of the evidence.

The same time and attendance report indicates that appellant Brennan was in court-leave status (agency code 07) the week prior to the strike. The personnel log for August 3 states that appellant was on "JURY D." Appellant's name does not appear on subsequent personnel logs for the week of August 3, perhaps indicating that the agency considered him to be AWOL. More sig-

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[6] Chief Pol testified that once a proposal notice was sent, the individual who was the subject of the proposal was not permitted to return to the facility, or reassume his duties as an air traffic controller. H.T. 85.

nificantly, however, an agency memorandum to the file (FAA Form 1360-33) dated 11:20 a.m., August 4, 1981, and signed by Personnel Management Specialist Lucy Fairweather, states the following:

> James Brennan—Jury Duty
>
> ATCS James Brennan was summoned for Jury Duty and was selected for a jury on a case being heard by Judge Gorman. I contacted the Judge's Chambers and spoke to his Court Officer, Peter Miller, requesting the release of ATCS Brennan from serving on this jury.
>
> *Conclusion, Action Taken, or Required*
>
> Court Officer, Miller, advised that Judge Gorman spoke to ATCS Brennan and advised him to call the Center.
>
> The Court Officer also advised that the jury ATCS Brennan was on had reached a verdict and the jury was being returned to the Central Jury Room. At that time, I contacted Ann Marie Callahan in the Central Jury Room requesting the release of ATCS Brennan for the remainder of his term of service. She referred me to the Deputy Commissioner of Jurors, Mr. D'Abramo. I asked the Deputy Commissioner if he would release ATCS Brennan, and he said he would not unless ATCS Brennan requested to be released.

No further documentation of agency efforts to contact appellant or steps taken to effectuate his release from jury duty were introduced into evidence. Nor did agency officials testify or present witnesses concerning any such efforts. When questioned on cross-examination about appellant Brennan's circumstances, Chief Pol admitted that if he had known appellant was on jury duty he would not have been charged with striking or AWOL on the days in question. H.T. 141.

5 U.S.C. § 6322 provides in relevant part that:

> (a) An employee as defined in section 2105 of this title . . . is entitled to leave, without loss of, or reduction in pay, leave to which he otherwise is entitled, credit for time or service, or performance of efficiency rating, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve
>
> (1) as a juror . . . .

Federal Personnel Manual (FPM), Chapter 630-23, Subchapter 10 (March 15, 1972), further elaborates upon this statutory recognition of an agency's responsibility to permit its employee to serve on juries. It provides in relevant part:

> (b) Definitions. Court leave is the authorized absence without charge to leave or loss of pay, of an employee from work status for jury duty, or for attending judicial proceedings in a non-official capacity as a witness on behalf of a State or local government. The court or judicial proceeding may be located in the District of Columbia, a State, territory, or possession of the United States including the Commonwealth of Puerto Rico, the Canal Zone, or the Trust Territory of the Pacific Islands. The term "judicial proceeding" contemplates any action, suit, or other proceeding of a judicial nature, but does not include an administrative proceeding.
>
> * * *
>
> e. Duration of jury service. An employee who is under proper summons from a court to serve on a jury should be granted court leave of absence with pay for the entire period, regardless, of the number of hours per day or days per week he actually serves on the jury during the period.

> f. Interim excuse from jury duty. When no hardship would result, an agency may, at its discretion, require an employee entitled to court leave because of jury service to return to duty or be charged annual leave if he is excused from jury service for one day or even a substantial part of a day. The employee may not, however, be required to return to duty if it would work a hardship on him.

The Board has previously held on numerous occasions that an agency which charges an employee with AWOL in an appealable adverse action carries the burden of providing under 5 U.S.C. § 7701(c)(1)(B) that its decision is supported by preponderant evidence, including the propriety of the decision to deny leave. *See, e.g., Hockman* v. *American Battle Monuments Commission*, MSPB Docket No. SF07528110757 at 1 (July 30, 1982); *Barger* v. *Department of Justice*, MSPB Docket No. SE075209019 at 2 (November 15, 1981); *Bavier* v. *Department of Transportation*, 5 MSPB 73, 74 (1981); *In re Van Sciver*, 1 MSPB 94 (1979).

In *Schapansky, supra*, at 6 n.2, we stated:

> In a case, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. The burden of persuasion would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. The agency, of course, must ultimately establish appellant's participation by a preponderance of the evidence pursuant to 5 U.S.C. § 7701(c)(1)(B).

Based on the admittedly less than fully developed evidence of record, the Board must find that the agency has failed to establish by preponderant evidence that appellant Brennan was participating in a strike and absent without leave during the period of time he was serving on a jury under court leave. The agency did not present any direct evidence that appellant participated in the strike. The agency has failed to demonstrate that he was properly excused from jury duty or legally ordered to return to work during the period of time which is the subject of the charges against him, and that no hardship would result to appellant by requiring him to return to duty during any interim excuse from jury duty. FPM Ch. 630, subch. 10-2f (March 15, 1972). Accordingly, the charges against appellant Brennan are found not to be sustained.

The facts of appellant Coleman's case are similar to those of appellant Brennan. Appellant Coleman is charged with participating in the strike and unauthorized absence commencing August 4. The removal proposal notice was sent August 5, 1981. The time and attendance report indicates that appellant was AWOL. However, a memorandum to the file (FAA Form 1360-33) dated 10:15 a.m., August 3, 1981, by Personnel Management Specialist Tom Wilson, states, in relevant part:

> John Coleman—Jury Duty
>
> I requested that John Coleman be relieved from his jury duty service due to the strike. Mr. Loggia [Warden of Grand Jury, Brooklyn, New York] explained that a written request must be submitted to the Grand Jury. A judge will make a decision as to whether Coleman can be released from jury duty. The request was sent via Mailgram at 11:00 AM to: Grand Jury, 360 Adams Street, Brooklyn, NY 11201, Rm. 282. I also checked days Coleman served on

jury duty since 5/18/81. Mr. Loggia related the following:

Period 1: 5/18 - 6/12—on Jury Duty except 6/8.

Period 2: 6/15 - 7/10—served 6/15, 17, 18, 19, 22, 23, 24, 29; 7/1, 2, 6, 7, 9.

Period 3: 7/13 - present—served 7/14, 15, 16, 17, 20, 21, 23, 28, 29, 30.

The Office of the District Attorney of Kings County responded to the referenced mailgram on August 4, 1981, in a letter which states:

> Kindly be advised that the above-named individual was impaneled by Honorable Judge Leonard Scholnick as a member of the of the [sic] Regular Grand Jury of Term 6—1981. This was not a voluntary action, but rather an order of the court mandated to be obeyed.
>
> The aforementioned jury has been in session since May 18, 1981 and will terminate September 30, 1981. However, inasmuch as there are still cases pending in this jury, the aforementioned juror will be required to attend sessions from time to time, whenever his jury is notified to convene, in order to complete these open cases.
>
> We thank you for your cooperation in this matter and, should you have any questions relative thereto, please feel free to contact me at (212) 834-5008.

There is no evidence of record that the agency took further steps to excuse appellant Coleman from jury duty or otherwise contacted him in an attempt to order him to return to work. Nor is there any direct evidence of record that appellant participated in the strike. Based on the evidence of record, the Board must conclude that a preponderance of the evidence does not support the charges that appellant Coleman was participating in a

strike and absent without leave. The record clearly reflects that appellant Coleman was serving on jury duty under court leave, and had not been excused from the same, on the dates made the subject of the charges against him. Accordingly, the charges cannot be sustained.

Certain appellants are charged with participating in the strike and absence without leave only on days outside the official notice period described in *Ketchem, supra,* at 9. Appellants Carlstrom and Giannattasio were charged commencing August 12, 1981, the date on which the removal proposal notices were sent. Appellants Darcy and DiMasso were charged commencing August 9 and the proposals were sent August 10, 1981. Appellant Finnegan was charged with the same offenses only for August 19, 1981, the date on which the removal proposal was sent. Appellants contend they were on approved annual leave prior to the dates on which they were charged and the agency does not dispute that contention.[7] As to each of these appellants the petitions for review contend that the presiding official erred in finding that they were, or could have been, acting in concert with others to withhold their services on the dates in question.

Under *Ketchem, supra,* at 9, "the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned to work on that date."

---

[7] Appellant Adams contends in his petition for review that he was on approved annual leave prior to August 8, the date his proposal notice was sent. The proposal charges appellant Adams with participating in the strike commencing August 3. Appellant Adams did not claim he was on leave August 3-7 at the hearing and has offered no evidence he was in approved leave status, nor do the agency's records so reflect. *See* H.T. 120-21. In any event, it is conceded that appellant Adams was absent without authorization at least on August 8, 1981.

Chief Pol testified that each of the appellants would have been permitted to return to work prior to the deadline shift with which they were charged with striking. H.T. 85-86. He further testified that none of these appellants contacted the facility to attempt to return to work or clarify their situation. H.T. 86. The testimony establishes that picketing at the installation commenced on the morning of August 3 and continued until sometime in November 1981, but in any event through August 21. H.T. 76-77. Substantial numbers of air traffic controllers would have been permitted to return to work after August 6, and that "in a couple of cases" the deadlines were as late as August 19. H.T. 84.

Also, a part of the record in these cases is "Presidential Updates" issued by Robert E. Poli on September 25 and October 8, 1981. File, Tab. 13. Without quoting them in their entirety, it suffices to say that both repeatedly characterize the strike as ongoing and refer to it in the present tense. Additionally, the record contains a transcript of ABC-TV "Issues and Answers" of August 9, 1981. Therein, Mr. Poli unequivocally states at the beginning of the discussion that "[t]he strike will absolutely continue."

In the face of this evidence that the strike was in progress on and after August 7, 1981, appellants have offered no evidence that a strike was not occurring and have offered no explanation for their absence on the dates in question.

The Board concludes that the agency established by a preponderance of the evidence that the strike was continuing through at least August 19, 1981, and that appellants' absences on dates between August 7 and August 19 were of their own volition and done with the intent to withhold their services from their employer in concert with others. *See Schapansky, supra,* at 6.

The presiding official, therefore, properly found the charges against appellants Carlstrom, Darcy, DiMasso, Finnegan, and Giannattasio sustained. *See Noa* v. *Department of Transportation*, MSPB Docket No. NY075281F0697 at 8-9 (April 25, 1983).

Accordingly, the intial decision sustaining the agency's actions in removing appellants Brennan and Coleman is hereby REVERSED and the agency is hereby ORDERED to cancel the actions separating those appellants. The initial decision as to the removal actions of the remaining appellants is hereby AFFIRMED as MODIFIED by this Opinion and Order and the agency actions removing those appellants are hereby SUSTAINED.

The agency is hereby ORDERED to submit written verification of its compliance with this Order to the Office of the Secretary of the Board within twenty (20) days of the date of this Order. In the event of agency noncompliance, a petition for enforcement may be filed with the New York Regional Office pursuant to 5 C.F.R. § 1201.181(a).

This is the final Order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Appellants are hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellants' receipt of this order.

FOR THE BOARD:

April 25, 1983
(Date)

/s/ Herbert E. Ellingwood
HERBERT E. ELLINGWOOD
Chairman

April 25, 1983
(Date)

/s/ Ersa H. Poston
ERSA H. POSTON
Vice Chair

April 25, 1983
(Date)

/s/ Dennis M. Devaney
DENNIS M. DEVANEY
Member

Washington, D.C.

APPENDIX A

| | |
|---|---|
| Adams, Richard | NY075281F0424 |
| Amodeo, William | NY075281F0430 |
| Bender, Richard | NY075281F0435 |
| Biancamano, Robert | NY075281F0439 |
| Bonacum, Bruce | NY075281F0442 |
| Brennan, James | NY075281F0450 |
| Bronleben, Richard | NY075281F0454 |
| Brophy, Joseph | NY075281F0455 |
| Brunner, John | NY075281F0457 |
| Burns, Richard | NY075281F0460 |
| Carlstrom, Kenneth | NY075281F0469 |
| Cecil, William | NY075281F0473 |
| Chevalier, Antonio | NY075281F0477 |
| Coleman, John | NY075281F0482 |
| Connelly, Thomas | NY075281F0486 |
| Contegni, Charles | NY075281F0487 |
| Contegni, Thomas | NY075281F0488 |
| Corrigan, Martin | NY075281F0492 |
| Cresong, Claude | NY075281F0495 |
| Curran, Gerard | NY075281F0500 |
| Darcy, Charles | NY075281F0507 |
| Dawson, Gary | NY075281F0509 |
| DeLeonardis, Dennis | NY075281F0512 |
| Denny, Douglas | NY075281F0515 |
| DiMasso, Anthony | NY075281F0520 |
| Dorrance, Bernard | NY075281F0522 |
| Duffield, Raymond | NY075281F0523 |
| Ennis, Wayne | NY075281F0531 |
| Erianne, Gregory | NY075281F0532 |
| Finnegan, James | NY075281F0538 |
| Foree, James | NY075281F0544 |
| Fry, James | NY075281F0548 |
| Giannattasio, Allen | NY075281F0556 |
| Miller, Raymond | NY075281F0671 |
| Rocks, Edward | NY075281F0748 |

## CERTIFICATE OF SERVICE

I hereby CERTIFY that a copy of the foregoing Opinion and Order was sent by certified mail this date to the following:

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E. Setauket, NY 11733

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By hand to:

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Office of the Secretary
Mailed for Service

Apr. 25, 1983
(Date)

CTF. No._____
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/s/ Tim Franklin for
ROBERT E. TAYLOR,
Secretary

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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Docket Number BN075281F0558

LAWRENCE G. MARTEL

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

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## OPINION AND ORDER

Lawrence G. Martel (appellant) petitioned the Board's Boston Regional Office for appeal of the action of the Department of Transportation's Federal Aviation Administration (agency) removing him from his GS-14 position as an Air Traffic Controller (ATC) at the Boston Air Traffic Control Tower in Boston, Massachusetts, effective September 1, 1981. The removal action was based on two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence (absence without leave or AWOL). Both charges arose from appellant's leaving the facility at 7:00 A.M. on August 3, 1981, one hour before the end of his scheduled shift, and his failing to report for duty on August 4 and 5, 1981, as scheduled.

In an initial decision dated September 2, 1982, the presiding official first considered appellant's allegation that, by placing him in a nonduty, nonpay status for the notice period of his removal, the agency had effectively suspended him without adhering to the adverse action procedures required under 5 U.S.C. § 7513(b). The

presiding official concluded that the agency did so suspend appellant from approximately August 10, 1981, when appellant was ready, willing, and able to return to work, through September 1, 1981, the effective date of his removal. The presiding official determined that since the suspension was for more than 14 days, the Board had jurisdiction over the action under 5 U.S.C. §§ 7512 and 7513(d). He then concluded that the action was fatally tainted by harmful error on the part of the agency, requiring reversal of the suspension under 5 U.S.C. § 7701 (c) (2) (A).[1]

As to the removal action itself, the presiding official found that the agency proved the charges by preponderant evidence, that appellant's affirmative defenses were without merit, and that the removal was appropriate under the circumstances and promoted the efficiency of the service. The presiding offiical therefore sustained appellant's removal.

The agency has now filed a petition for review of the initial decision, arguing that the presiding official erred in finding the agency suspended appellant during the pendency of his removal from Federal employment. Appellant has filed a cross-petition for review arguing that the presiding official erred in sustaining the removal action. He contends that the presiding official erred in finding that the agency proved its charges by preponderant evidence, that removal was an appropriate penalty, and that appellant did not prove his affirmative defenses. Appellant has also filed a response in opposition to the

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[1] A suspension for more than 14 days taken without adherence to any of the procedural requirements of 5 U.S.C. § 7513 constitutes harmful error under 5 U.S.C. § 7701(c) (2) (A). *Cuellar* v. *United States Postal Service*, MSPB Docket No. SF075299045 at 12 (November 13, 1981); *Kerr* v. *National Endowment for the Arts*, 5 MSPB 299 (1981); *Morrow* v. *Department of the Army*, 4 MSPB 494 (1980); *White* v. *Department of the Treasury*, 4 MSPB 11 (1980).

agency's petition, and the agency has responded to appellant's petition.

On January 18, 1983, the Board published a notice in the Federal Register, offering to accept and consider *amicus* briefs on significant common legal issues raised in related former ATC appeals for which petitions for review are pending before the Board. That notice was open-ended as to both cases and issues. *See* 48 Fed. Reg. 2235-36 (1983). The Board has now received and considered all of the *amicus* briefs submitted by appellants and agencies, in addition to the briefs of the parties in this appeal.

The petitions for review are hereby GRANTED under 5 U.S.C. § 7701(e)(1).

The agency argues in its petition that it did not suspend appellant during the advance notice period of his removal. The agency asserts that appellant was in a nonpay status during the removal process not as a disciplinary matter, but as a matter of pay administration. Appellant voluntarily withheld his services, and therefore was not entitled to be paid for the time period in question. The agency contends that an employee who communicated that he was ready, willing, and able to return to work is entitled to pay status from the time of his bona fide effort to return until the effective date of the removal. However, the agency maintains that because of the statutory prohibition against strikes, a bona fide effort requires an unequivocal showing not only that appellant was willing to return to work but also that he had abandoned the strike. The agency contends that the record does not support such a finding in this case.

Appellant herein reported for his scheduled shift at midnight on August 2, 1981, and worked until 7:00 A.M. on August 3, 1981. He has admitted he left work at 7:00 A.M., one hour before the end of his scheduled shift, and did not return to scheduled duty on the follow-

ing two days. Appellant received his letter of proposed removal dated August 6, 1981, on August 9, 1981. The letter stated that the "crime provision" procedures were being invoked to shorten the period for appellant's response to his proposed removal to within 7 days as opposed to the usual 30 days.[2] *See* 5 U.S.C. § 7513(b). By letter dated August 25, 1981, appellant was removed from his position, effective September 1, 1981.

Appellant testified he made no attempt to return to work the first week after he walked out on August 3, 1981. Hearing Transcript at 470. He testified further that about a week after he received his removal notice he called his facility to ask whether he could return to work and was told "good luck." *Id.* at 420. This testimony was unrebutted by the agency. Appellant has also admitted that he picketed the second week of the strike, after he received the removal notice, but stated that he did so only to protest his unfair treatment by the agency. Appellant's Answers to Interrogatories #26; Hearing Transcript at 445, 447, 448, 472. Appellant testified that he wanted to work, but that PATCO officials and other individuals informed him that controllers were not allowed back after August 6, 1981. Hearing Transcript at 473.

The agency proposing official testified that, once an appellant failed to report for his first scheduled shift after the Presidential deadline, he was precluded from returning to the facility. *Id.* at 287. The official did not mention whether this was communicated to the air traffic controllers. He testified that appellant was continued in a nonpay status throughout the removal period and that,

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[2] By letter dated August 12, 1981, the proposing official amended the proposal letter to provide appellant with the correct telephone number of the person to contact to review material relied upon to support the reasons for his proposed removal. The letter further advised appellant that his date to reply to the proposed notice was extended to seven days from receipt of the August 12, 1981, letter.

even had he tried to return, the agency would not have allowed him to do so, nor would it have paid him for that period. *Id.* at 367.

Under 5 U.S.C. §§ 7511(a)(1), 7512(2), and 7513(b), an agency is required to afford specific procedural rights to a nonprobationary competitive service employee like appellant before undertaking a suspension action for more than 14 days against such an employee.[3] A "sus-

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[3] In *Cuellar* v. *United States Postal Service, supra,* at 10, the Board invalidated an OPM regulation, 5 C.F.R. § 752.404(d)(3), which permitted emergency suspensions pending removals of dangerous or troublesome employees, as inconsistent with 5 U.S.C. § 7513(b) which requires, *inter alia,* at least 30 days' written notice of an adverse action. The only exception to the 30 days' notice requirement is the "crime exception" of 5 U.S.C. § 7513(b) which permits shortening the notice period to a minimum of seven days to reply when the agency has reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. The Board notes that the crime provision relates solely to the duration of the advance notice period and the opportunity to answer. It has no direct bearing on a suspension during the notice period.

Federal regulations at 5 C.F.R. § 752.404(d)(1) nonetheless provide an exception to an employee's right to be retained in an active duty status during the notice period. This section provides that "[w]hen the circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time, not to exceed ten days, as is necessary to effect the action." Agency regulation FAA Order No. 3770.2B, Section 3.206a(7) is in accord with the Federal regulations. *See* Appellant's Exh. 23.

Moreover, GENOT (General Notice) 1/128 dated August 4, 1981, provides that controllers who appeared for duty after the deadline had passed should be placed in a nonduty status not to exceed ten calendar days. *See* Appellant's Exh. 5. Hence, it appears the agency may have been attempting to invoke the regulation regarding administrative leave, although the GENOT does not mention pay status. In any event, since the regulation is designed to provide an agency with authority to keep a dangerous and troublesome employee off its premises during the notice period of a removal action and is not designed to limit liability, the agency's contention that the regulation limits its liability for an unlawful suspension to ten days' backpay is unpersuasive.

pension" is defined at 5 U.S.C. §§ 7501(2) and 7511 (a)(2) as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." The Board has interpreted the statutory definition of "suspension," in the context of an enforced leave appeal, as consisting of the following three essential elements:

(1) the action must be involuntary;

(2) the action must be disciplinary; and

(3) the employee must, in fact, be ready, willing, and able to work during the period in question.

*Mosely* v. *Department of the Navy*, 4 MSPB 220, 221 (1980), *aff'd*, No. 35-80, slip op. (Ct. Cl. December 23, 1981).

The agency argues that it did not place appellant in a nonduty status without his consent. The agency contends that when appellant voluntarily refused to report for work on August 3, 1981, through the end of the grace period, he was AWOL. The agency argues that, since appellant did not change his conduct during the notice period, he continued to be AWOL and thus continued to be carried in a nonpay status. The agency asserts that appellant's placement in a nonduty, nonpay status cannot be considered an adverse action appealable under 5 U.S.C. § 7513 because the action was voluntary and initiated by the employee, 5 C.F.R. § 752.401(c)(3), so that the first jurisdictional test has not been met.

The agency contends that the second element of a suspension was also not met because the only discipline imposed in this case was the removal. The agency contends again that it simply continued appellant in the nonpay status he had adopted.

As to the third suspension criterion, the ready, willing, and able test, the agency maintains that an employee must make a bona fide effort to show that he abandoned the strike and was ready to return to work before he

was entitled to pay status. In some of the *amicus* briefs it was argued, however, that the ready, willing, and able test does not apply where, as here, the evidence demonstrates that the agency would not have allowed the employee to return to work.[4] In other words, upon termination of the President's grace period, appellant would not have been permitted to return to duty, so that any attempt to return would have been futile.

In the private sector, the right to strike is protected by section 7 of the National Labor Relations Act.[5] The general rule in the private sector is that an unlawfully discharged striker can collect backpay for the period of time after he indicates abandonment of the strike and a willingness to return to work. *Abilities & Goodwill, Inc.*, 241 N.L.R.B. 5, 100 L.R.R.M. 1470, *enforcement denied on other grounds*, 612 F.2d 6 (1st Cir. 1979); *Astro Electronics, Inc.*, 188 N.L.R.B. 572, 573-76, 76 L.R.R.M. 1530, *enforced*, 463 F.2d 176 (9th Cir. 1972). Both the National Labor Relations Board and the courts recognize an exception to this rule, however, where an offer to return to work would have been futile. *See NLRB* v. *Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 755-57 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).[6] This futility rule is based primarily on the unlawfulness of the em-

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[4] GENOT 128, which was sent to all FAA air traffic control facilities on August 4, 1981, instructed that "controllers who appear for duty after the appropriate deadline has passed shall be placed in a nonduty status not to exceed ten calendar days." Appellant's Exh. 5. *See* n.2 *supra*. *See also* Hearing Transcript at 287, 367, 368.

[5] *See* 29 U.S.C. § 157.

[6] *See also NLRB* v. *Valmac Industries, Inc.*, 533 F.2d 1075, 1077 (8th Cir. 1976); *Virginia Stage Lines, Inc.* v. *NLRB*, 441 F.2d 499, 504 (4th Cir.), *cert. denied*, 404 U.S. 856 (1971); *N.L.R.B.* v. *Southern Greyhound Lines*, 426 F.2d 1299, 1303 (5th Cir. 1970); *NLRB* v. *Valley Die Cast Corp.*, 303 F.2d 64, 66 (6th Cir. 1962); *Sigma Service Corp.*, 230 N.L.R.B. 316, 95 L.R.R.M. 1359 (1977); *Astro Electronics, Inc., supra*, at 1471.

ployer's action in an unfair labor practice strike. *Id.* at 756. Since the employer has violated the Act in discharging an employee engaged in a lawful strike, the employer has the burden to remedy the situation. *Id.* Ambiguities generated by the illegal act of the employer are resolved in favor of the striking employees. *Abilities & Goodwill, Inc., supra,* at 1471.

In contrast, Federal employees have no statutorily protected right to strike, but rather are expressly prohibited from striking by 5 U.S.C. § 7311 and 18 U.S.C. § 1918. *See Ketchem* v. *Department of Transportation,* MSPB Docket No. DA075281F0713 at 5 (May 28, 1982). In *United Federation of Postal Clerks* v. *Blount,* 325 F. Supp. 879, 882 (D.D.C.), *aff'd,* 404 U.S. 802 (1971), the Court noted the difference in treatment accorded public and private employers by Congress, and pointed out that in the National Labor Relations Act of 1937, as well as the Labor Management Relations Act of 1947 (Taft-Hartley), the term "employer" was defined "as not including any governmental or political subdivisions, and therefore, indirectly withheld the protections of § 7 from governmental employees." Moreover, the Board is unaware of any instances in which the futility rule, as applied in private sector cases, has been similarly applied in cases of prohibited striking by Federal employees under 5 U.S.C. § 7311 and 18 U.S.C. § 1918. The Board finds, therefore, that private sector law concerning the circumstances under which a striker may collect backpay is not controlling with respect to striking in the public sector.[7]

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[7] It may, nonetheless, be worthy of some consideration. *See Duckett and Yardley* v. *Tennessee Valley Authority,* MSPB Docket No. AT07528010325 (February 19, 1982); *Jones* v. *Tennessee Valley Authority,* MSPB Docket No. AT07528010300 (February 19, 1982) (in both cases the Board considered that the concept of participation in a strike or work stoppage is the same in the private and public sectors).

Even if private sector law were directly applicable, the futility rule does not apply where, as here, no illegal act has been committed by an employer. Under those circumstances, private sector employees are required to notify the employer of their intent to abandon the strike and their desire to return to work. *See Abilities & Goodwill, Inc., supra,* at 1471.

The Board has consistently held that participation in a strike against the Federal government by Federal employees is a grave offense. The primary statutory strike prohibition, 5 U.S.C. § 7311, proscribes the employment of any person who strikes against the government. The legislative history of the no-strike provision reveals that Congress expressly prohibited the payment of wages to those who engage in such a strike.[8] In addition, the criminal statute at 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment. In *Schapansky* v. *Department of Transportation,* MSPB Docket No. DA075281F1130 at 10-11 (October 28, 1982), the Board held that participation in a strike by an air traffic controller constitutes "particularly egregious conduct" such that the agency's imposition of the removal penalty cannot be deemed to exceed the bounds of reasonableness. In *Johnson* v. *Department of Transportation,* MSPB Docket No. DC075281F0998 at 8-11 (November 10, 1982), the Board rejected the liberal civil standard for coercion as a defense to a charge of strike participation, and adopted a stricter standard "in light of the severity of a Federal employee's participation in a strike against the government."

Consistent with *Schapansky* and *Johnson,* and given the strong Congressional mandate against striking, together with appellant's rejection of the Presidential grant of

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[8] *See generally United Federation of Postal Clerks* v. *Blount,* 325 F. Supp. 879, 882-83 (D.C.C.), *aff'd,* 404 U.S. 802 (1971), for a full discussion of the legislative history of 5 U.S.C. § 7311.

amnesty, the Board finds no reason to relax the general rule that an appellant bears the burden of proving every element of the Board's jurisdiction over his asserted constructive suspension. *See* 5 C.F.R. § 1201.56(a)(2); *Mosely, supra.* Thus, the Board concludes that appellant must prove by preponderant evidence that he contacted an agency official with decision-making authority (in person or otherwise) to communicate unequivocally his availability and his desire to return to duty. This would establish that appellant was ready, willing, and able to return to work.

If appellant makes such a showing, we find that the agency's admission that an employee who failed to report for his first scheduled shift after the Presidential deadline was precluded from returning to duty is sufficient to establish that his absence, after his attempted return to duty, was both involuntary and disciplinary in character.[9] The pivotal jurisdictional issue at this point, then, is whether appellant has established that he was indeed ready, willing, and able to work during the time period in question.

The record shows that appellant received the August 6, 1981 letter of proposed removal on August 9, 1981. Appellant admits he made no attempt to return to work the first week of the strike after he walked out on August 3, 1981. Hearing Transcript at 470. He testified without rebuttal that about a week after he received his removal notice he called his facility to ask whether he

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[9] The agency argues that the purpose of any such constructive suspension was to keep strike participants off the facility grounds based on a concern that striking employees receiving notice of proposed removal would, if permitted to return to the facility, disrupt air traffic service. However, an implicit element of an employee's showing that he was ready, willing, and able to return to work is disavowal of the strike. Thus, the agency's concern is not reasonably applicable to any employee who meets the ready, willing, and able test.

could return to work and was told "good luck." [10] *Id.* at 420. Appellant testified that he wanted to work but that PATCO and other individuals informed him that controllers were not allowed back after August 6, 1981. *Id.* at 473. Appellant did not specify, however, with whom he spoke in this regard or any underlying circumstances of his information.

As noted above, the presiding official found that appellant was ready, willing, and able to work and that he was, therefore, suspended from August 10 through September 1, 1981. The Board disagrees. We find that the evidence of record is insufficient to establish that appellant was ready, willing, and able to work after receiving his proposed removal notice. Regarding his phone call to the agency sometime around the 10th of August, appellant does not mention to whom he talked, whether that person was a supervisor or had any decision-making authority, or what specifically he said to that agency employee. Based on the evidence of record, the Board cannot find that appellant unequivocally communicated to the agency his availability and his desire to return to duty. The Board finds, therefore, that appellant was not suspended during the notice period of his removal, so that there was no appealable adverse action under 5 U.S.C. §§ 7501(2), 7512(2), and 7513(d).

We next consider appellant's arguments concerning the removal action.

Appellant argues, first, that the presiding official erred in finding that the agency established a *prima facie* case of strike participation. Appellant alleges that the agency failed to provide him with a definition of the word "strike," or to notify him as to what actions constituted participation in a strike. Appellant contends that notice is a necessary element of the agency's *prima facie* case.

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[10] Appellant does not recall the exact date of this telephone call. Appellant's Answers to Interrogatories #37.

Even if the agency did establish a *prima facie* case, appellant argues he successfully rebutted such showing by proving he was misled by the agency's failure to notify him of the consequences of his actions and by proving that he was intimidated by PATCO. He claims that the presiding official applied an incorrect standard in determining whether appellant's fear of physical harm was sufficiently reasonable to render his absence from work involuntary.

In *Schapansky* v. *Federal Aviation Administration*, *supra*, at 6 n.2, the Board held that where the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's participation in the strike by presenting evidence of his unauthorized absence from duty during the strike. We held, further, that once the agency established its *prima facie* case, the burden of going forward shifts to the appellant to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than voluntary participation in the strike. *Id.* The agency nonetheless retains the ultimate burden of establishing the employee's participation in the strike by preponderant evidence under 5 U.S.C. § 7701 (c) (1) (B).

In this case, the presiding official found that the agency established a *prima facie* case by proving that appellant was AWOL from August 3, 1981, at 7:00 a.m. through August 6, 1981, at 7:00 a.m., that a strike was still in progress on that date,[11] and that appellant knew of the existence of the strike and its illegality. Initial Decision at 5. The presiding official considered at length appel-

[11] The presiding official took official notice of the fact that a strike by members of PATCO against the Federal Government began on August 3, 1981, and continued at least through August 6, 1981, and found that such strike was illegal. *See Ketchem* v. *Department of Transportation*, *supra*, at 9.

lant's defense that he was misled by the agency's lack of notice and its past tolerance of strikers, and found these arguments to be without merit. *Id.* at 9-10. Appellant merely disagrees with the conclusions reached by the presiding official. The Board discerns no errors of fact finding on the part of the presiding official, and we will not disturb his findings in this regard. *Weaver* v. *Department of the Navy*, 2 MSPB 297 (1980).

The presiding official also considered appellant's duress defense and concluded that it did not meet the standard established by the Board in *Johnson* v. *Department of Transportation, supra.* Initial Decision at 6-7. In *Johnson* at 11-12, the Board held that the appropriate standard for establishing a defense of coercion or duress requires the employee to demonstrate that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist. Applying this standard to the facts of this case, the Board agrees with the presiding official that appellant did not establish his defense of coercion. In *Johnson, supra,* at 8-9, we specifically found that pressure resulting in a state of mental perturbation, or reluctance to act, or a choice of inherently unpleasant situations does not constitute such coercion.

Thus, we find appellant's contention in this regard to be without merit. We agree with the presiding official that appellant did not rebut the *prima facie* case of strike participation, and that the agency proved the charge by preponderant evidence.

Appellant next argues that 5 U.S.C. § 7311(3) does not mandate removal and that the facts of his case, particularly his exemplary 20-year record as a controller, warrant mitigation. The presiding official determined that appellant in this case was in the same situation as

the appellant in *Schapansky, supra,* and that, therefore, no basis for mitigation existed.

We agree. In *Schapansky, supra,* at 11, the Board reviewed similar potentially mitigating circumstances and found them to be insufficient to warrant reduction of the removal penalty. In that case, the Board found that under *Douglas* v. *Veterans Administration,* 5 MSPB 313 (1981), the agency's imposition of a removal penalty on an air traffic controller cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the Federal government, despite many years of government service or a flawless prior employment record. The nature and gravity of such an offense and its direct effect on the agency's ability to perform its mission, as discussed in *Schapansky, supra,* at 10-11, far outweigh such otherwise mitigating factors. Therefore, the Board will not disturb the removal penalty imposed by the agency in this appeal.

Next, appellant argues that the agency's notice of its decision to remove him impermissibly chilled his exercise of union rights by qualifying his access to the negotiated grievance procedures.[12] The presiding official found that the agency's language in the removal notice was not a threat, but merely an expression of the agen-

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[12] The letter stated in relevant part as follows:

> If . . . you believe this action violates Article 69 [of the effective collective agreement] and you choose to file a grievance, you must submit a written grievance to your Facility Chief no later than 15 calendar days after the effective date of the removal. In this connection, you should know that the FAA has filed an Unfair Labor Practice (ULP) charge against PATCO for its role in the strike and is seeking to have the union decertified. The case is now being processed by the authority and a determination that PATCO committed a ULP could impact on the processing of grievances under the PATCO/FAA Agreement. If the union is decertified and the agreement terminated, this avenue of appeal may not be available to you.

cy's opinion as to appellant's grievance rights. He found that appellant did not show that the statement was in error, or that it was an attempt to mislead appellant concerning his rights. Therefore, he found that appellant's claim that the agency threatened him regarding his right to elect the negotiated grievance procedure was without merit.

We agree. While the language of the notice goes beyond merely informing appellant of the existence of the contract procedures for attempted resolution of his potential grievance, we find the language was not misleading and had no chilling effect. To the contrary, it accurately describes the state of affairs existent during August of 1981. Indeed, the implications of decertification of the union suggested in the notice ultimately bore fruit. *See PATCO* v. *Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982); *Professional Air Traffic Controllers Organization and Federal Aviation Administration*, 7 F.L.R.A. No. 10 (1981). The Board finds no error in the wording of the notice of decision to remove.

Appellant argues, in addition, that the presiding official erred in refusing to allow certain agency witnesses to testify concerning the mechanics of the grievance procedure and, in particular, how grievances proceeded after August 3, 1981. Had he been allowed to introduce such evidence, appellant alleges he would have proven that the grievance procedure was faster and fairer.

The record on appeal shows that the presiding official permitted the agency deciding official to testify as to appellant's routes of appeal from the agency's removal decision. Hearing Transcript at 147, 148, 150-53. The presiding official refused, however, to allow the witnesses to testify as to the grievance procedures themselves. He also refused to allow appellant to call Mr. Fischer, Chief of Labor Relations, FAA, New England Region, to testify as to the mechanics of the grievance procedures. The

presiding official found that such testimony would "not be relevant and material and would further be speculative." *Id.* at 159, 160. Again, the Board agrees with the presiding official. Appellant had the right to file an appeal of the removal action to the Board or to file a grievance with the agency. Appellant had a choice and he made it. What might have happened had he chosen the alternate route of appeal is clearly speculative. We find appellant's argument that the presiding official erred in this regard totally without merit.

Appellant further contends that the agency's adverse action file did not contain all the material relied on to support the reasons for the removal action. Specifically, appellant alleges that a newspaper photograph of appellant leaving the control tower on August 3, 1981, was circulated to the agency's proposing and deciding officials prior to issuance of the removal decision letter, without having been incorporated in the adverse action file, and created a bias against him in their minds. However, the deciding official provided unrebutted testimony that he observed the photograph only in the newspaper; that the photograph was not included in the adverse action file; and that he did not consider the photograph in reaching his decision to remove appellant. Hearing Transcript at 167-68, 175. The presiding official found that this testimony was credible, and determined that no procedural error had occurred. *See* Initial Decision at 13.

The statutory procedures set forth in 5 U.S.C. § 7513(b) for effecting an appealable adverse action against an employee require that the agency maintain, and the employee be provided with, upon request, copies of the material relied upon by the agency to support the proposed action. 5 U.S.C. § 7513(e). Further, regulations promulgated by the Office of Personnel Management provide as follows:

> The notice of proposal shall inform the employee of his or her right to review the material which is re-

> lied on to support the reasons for action given in the notice. The agency may not use material which cannot be disclosed to the employee or his or her representative . . . to support the reasons in the notice.

5 C.F.R. § 752.404(b)(1).

The notice of proposed removal sent to appellant expressly advised him that the material relied upon to support the proposed action was available for his review, and directed the manner in which such review could take place. However, since appellant made no attempt to review the material which the agency relied upon, Hearing Transcript at 452, he cannot be heard to claim that this procedural right was denied him. *See* 5 U.S.C. § 7513(e). *Compare McClelland* v. *Andrus*, 606 F.2d 1278, 1284-86 (D.C. Cir. 1979).[13]

In any event, an employee against whom an adverse action is proposed is not entitled to review material which was not relied upon by the agency, before responding to the proposal notice. *Hoover* v. *United States*, 513 F.2d 603, 607 (Ct. Cl. 1975).[14] Appellant has not established any basis for disturbing the presiding official's factual determination that the deciding official did not consider the photograph of appellant in reaching his decision to remove him. Therefore, because the agency did not rely upon the photograph in deciding to remove appellant, the photograph was properly excluded from the agency's adverse action file for appellant, and he was not entitled to review the photograph before responding to the removal proposal. *See Klein* v. *Department of Labor*,

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[13] *Compare also Higgins* v. *Kelley*, 574 F.2d 789, 793 (3d Cir. 1978); *Barnes* v. *Chatterton*, 515 F.2d 916, 919-21 (3d Cir. 1975).

[14] *See also Turnage* v. *United States*, No. 27-80, slip op. (Ct. Cl. March 12, 1982); *Shaw* v. *United States*, 640 F.2d 1254, 1257 (Ct. Cl. 1981); *Owens* v. *Department of the Air Force*, MSPB Docket No. SF07528010464 at 3 (November 3, 1981); *Klein* v. *Department of Labor*, 6 MSPB 249, 251 (1981).

6 MSPB 249, 251-252 (1981); *Siebert v. Department of Health, Education, and Welfare*, 4 MSPB 132, 133-34 (1980).

Appellant next contends that the agency's denial of his request for an extension of time to respond to the proposed removal notice constituted harmful error. He argued that he needed more time to obtain legal counsel. The presiding official considered this argument in his initial deicsion and found that the time period afforded appellant to respond was reasonable.[15] We find no error on the part of the presiding official in this regard. *See Land* v. *Federal Aviation Administration*, MSPB Docket No. CH07528110154 (July 21, 1982).

Appellant also argues that his request for an extension of time was summarily rejected because he was represented by PATCO and that such "involuntary association" was "highly prejudicial" to him. In this regard, we note that the agency's proposing official testified that he did consider appellant's request. He noted that appellant submitted a "union-generated response," that such responses routinely asked for an extension of time, and that a GENOT advised that routine requests be denied. Hearing Transcript at 350 and 357. The proposing official testified further, however, that he denied appellant's request because appellant asked for information not pertinent to the case and because the form request "did not discuss individual circumstances or individuals' particular problems." *Id.* at 357. Appellant has not presented any evidence to show that the proposing official refused the request because of animus against PATCO. Thus, we find appellant's argument to be without merit.

Appellant contends additionally that the agency is estopped from removing him because it earlier sought a

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[15] Although appellant's removal proposal invoked the "crime exception" of 5 U.S.C. § 7513(b)(1), which entitled appellant only to a minimum of seven days to reply, appellant was afforded a total of sixteen days to respond. *See* Initial Decision at 11.

temporary restraining order in Federal District Court, requiring striking controllers to resume working.[16] However, appellant raises this argument for the first time in his petition for review. Therefore, the Board need not consider it. *See* 5 C.F.R. § 1201.115; *Banks* v. *Department of the Air Force*, 4 MSPB 342, 343 (1980). Even if we were to consider appellant's argument in this regard, we could not find that the government, having sought legal avenues to prevent controllers from engaging in an illegal nationwide strike, is barred from removing those controllers who ignored court orders and engaged in the prohibited conduct.

Appellant argues further that he had no meaningful opportunity to respond to the charges because the agency had already decided that the statute required removal. He also argues that he was denied the opportunity to appeal to the agency officials who had discretion in his case. Lastly, he argues that the agency's action violated 5 U.S.C. § 2302(b)(2). These last three arguments have already been considered at length by the presiding official. *See* Initial Decision at 14-15. Appellant's arguments represent mere disagreement with the presiding official's findings of underlying fact. Since appellant has demonstrated no error in the presiding official's reasoning, we decline to disturb his findings on these issues. *See Weaver, supra.*

Accordingly, the initial decision dated December 2, 1982, is hereby REVERSED as to the presiding official's finding that the agency suspended appellant from August 10, 1981, through September 1, 1981, and AFFIRMED as to the removal action. Appellant's removal is hereby SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

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[16] *See* Agency file, Tab 5.

Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

April 25, 1983 (Date) — /s/ Herbert E. Ellingwood
HERBERT E. ELLINGWOOD
Chairman

April 25, 1983 (Date) — /s/ Ersa H. Poston
ERSA H. POSTON
Vice Chair

April 25, 1983 (Date) — /s/ Dennis M. Devaney
DENNIS M. DEVANEY
Member

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION and ORDER was sent by certified mail this date to:

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Date: Apr. 25, 1983

Washington, D. C.

/s/ Robert E. Taylor
ROBERT E. TAYLOR
Secretary

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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Docket Number: NY075281F0697
NY075281F0574
NY075281F0680

JOSEPH R. NOA [1]
HARVEY K. HATCH
STEPHEN J. MOYLAN

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

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## OPINION AND ORDER

Harvey K. Hatch and Stephen J. Moylan (appellants) were removed from their GS-14 positions of Air Traffic Control Specialist at the New York Air Route Traffic Control Center (Center) in Ronkonkoma, New York. The Federal Aviation Administration (agency) based the removal action on two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918 beginning at 7:00 a.m. and 3:00 p.m., respectively, on August 3, 1981, and continuing until the issuance of the notice of proposed removal on August 6, 1981; and (2) unauthorized absence for the same period of time.

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[1] Appellants' appeals were initially adjudicated on October 14, 1982, in the consolidated appeal of *Richard E. Golle* v. *Department of Transportation*, Docket No. NY075281F0560.

Joseph R. Noa (appellant) was also removed from his position as an air traffic controller based on charges of illegal strike participation and unauthorized absence beginning at 3:00 p.m., August 15, 1981, and continuing until the issuance of the notice of proposed removal on August 17, 1981.

On appeal to the Board's New York Regional Office, the presiding official designated to adjudicate these matters sustained appellants' removals following a hearing at which all parties were represented by counsel. In his initial decision, the presiding official found: (1) that the charges against appellants were supported by a preponderance of the evidence, (2) that appellants' failure to testify at the hearing merited drawing an adverse inference; (3) that appellants had failed to establish harmful error; (4) that the agency had established a nexus between the sustained charges and the efficiency of the service; and (5) that the penalty of removal was mandated by statute.

In their petitions for review, appellants argue that the decision to consolidate their appeals with those of seventy-nine air traffic controllers caused the presiding official to transfer the burden of proof from the agency to appellants and to improperly draw an adverse inference from appellants' failure to testify; that the agency failed to offer any proof with respect to their intention to participate in a strike or their actual participation in strike activity in concert with others; that the presiding official's reliance on time and attendance records was error because they are hearsay; that the presiding official failed to consider that appellants had no obligation to report for duty during the strike because they were scheduled for regular days off; that the agency improperly shortened the notice period; that the presiding official erred in finding that the strike lasted until August 6, 1981 (August 21, 1981 in the case of appellant Noa); and that the presiding official improperly found that removal was a reasonable penalty.

The Board hereby GRANTS appellants' petitions for review under 5 U.S.C. § 7701(e)(1).

On May 24, 1982, the presiding official ordered a prehearing conference to be held on June 4, 1982 for discussion of, *inter alia*, whether the appeals from the New York Center should be consolidated. On July 15, 1982, appellant Moylan and others submitted a proposed consolidation order but stated that they opposed such action because it would lead to confusion and unfairness. In an order dated August 30, 1982, the presiding official stated that the parties had, in a prehearing conference held the same day, "jointly requested that the hearings be further consolidated" and that "it was mutually agreed that all the cases on the attached list will be tried on September 20 through September 24, 1982." All three appellants' names were on that list. Finally, at the hearing the presiding official informed the parties that he intended to consolidate not only for hearing but also for the purpose of writing a decision, and appellants did not object to this procedure. Hearing Transcript (H.T.) at 245-46. Appellants now argue, however, that the consolidation resulted in a deprivation of due process and a gross miscarriage of justice. Appellants' acquiescence in the decision to consolidate their appeals may be deemed to render their argument of error without merit. *Ikerd* v. *Lapworth*, 435 F.2d 197 (7th Cir. 1970); *Davis* v. *Yellow Cab Co. of St. Petersburg*, 220 F.2d 790 (5th Cir. 1955).

However, assuming *arguendo* that appellants did not waive their initial objection to the act of consolidation, we will now analyze their contention that they were harmed by the presiding official's decision to consolidate their appeals. An administrative agency's docket management is a matter that is within its discretion. *REA Express, Inc.* v. *United States*, 568 F.2d 940 (2d Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). A presiding official has the authority to consolidate appeals if he is "of the opinion that the action could result in the appeals being

processed more expeditiously and would not adversely affect any party." 5 U.S.C. 7701(f).[2] In its Order On Motion For Consolidation, in *Trick* v. *Federal Aviation Administration*, MSPB Docket No. DC0752[illegible]F1144 (December 17, 1981), the Board, while denying a motion to consolidate air traffic controller appeals on a nationwide basis, stated:

> [T]he Board recognizes consolidation may be warranted at the regional offices where there is substantial commonality of counsel, work site, witnesses, and/or legal defenses. Presiding officials in the regional offices are in a posture to address individual claims as well as common issues of fact and law.

The appeals which were consolidated by the presiding official involved substantially the same questions of law and arose from the same operative facts,[3] the same counsel represented all of the appellants,[4] there was no apparent conflict of interest between the appellants, the witnesses called with respect to each appellant's case were substantially the same, and the act of consolidation resulted in an enormous saving of time and costs for all parties concerned. These factors all weigh in favor of the decision to consolidate. *See In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977); *DeFigueiredo* v. *Trans World Airlines, Inc.*, 55 F.R.D. 44 (1971); *Poulson* v. *Louisiana, Arkansas & Texas Transportation Co.* 7 F.R.D. 484 (W.D.La. 1947). In

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[2] *Cf.* FED. R. CIV. P. 42(a) which allows the courts greater latitude to order consolidation when in their judgment they find that consolidation may tend to avoid unnecessary costs or delay.

[3] All of the appellants had been employed at the same facility; they were all charged with participating in a strike and unauthorized absence during approximately the same period of time; and the deciding official in their cases was the same.

[4] The law firm of Solerwitz, Solerwitz & Leeds represented all of the appellants at the hearing.

addition, the fact that some of the appellants raised issues which were not common to all other appellants is not a sufficient reason to bar the act of consolidation. *Ikerd* v. *Lapworth, supra*; *Benzoni* v. *Greve*, 54 F.R.D. 450 (S.D.N.Y. 1972). Finally, consolidation may be ordered despite the objections of the parties to an appeal. *In Re Air Crash Disaster at Florida Everglades, supra.* Nonetheless, even where otherwise appropriate, consolidation should not be ordered where the parties would be prejudiced by that action. *Dupont* v. *Southern Pacific Co.*, 366 F.2d 193 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967); *United States* v. *Knauer*, 149 F.2d 519 (7th Cir. 1945), *aff'd*, 328 U.S. 654 (1946); *Schacht* v. *Javits*, 53 F.R.D. 321 (S.D.N.Y. 1971); *Capstraw* v. *New York Central R. Co.*, 15 F.R.D. 167 (N.D.N.Y. 1954); *Bascom Launder Corp.* v. *Telecoin Corp.*, 15 F.R.D. 277 (S.D.N.Y. 1953).

Appellants contend that they were prejudiced by the consolidation of their appeals because the presiding official (1) improperly assigned the burden of proof on the issues of strike participation and unauthorized absence to the appellants rather than to the agency, and (2) improperly drew an adverse inference from appellants' failure to testify or to answer interrogatories. These arguments are not persuasive since appellants have failed to show that the rulings complained of would have differed had their appeals been heard separately rather than simultaneously with other appeals. Consequently, we find that the presiding official properly exercised his discretion in determining to consolidate appellants' appeals.

Appellants next argue that the presiding official improperly shifted the burden of proof from the agency to appellants by requiring them to establish that they did not intend to strike and that since the agency failed to produce any evidence to support the charge that they had participated in the strike, the initial decision must be reversed. In *Schapansky* v. *Department of Transporta-*

*tion, Federal Aviation Administration,* MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982), the Board stated that "[i]n cases, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike." The Board stated that the burden of going forward would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike.

In this case, the presiding official found that the agency had established that appellants were absent on the dates charged based on the testimony of the Center Chief and the documents contained in the agency's files such as shift schedules, personnel sign-in logs, and time and attendance records. The Center Chief testified that each of the appellants in the consolidated appeal was scheduled to work on the dates and times they were charged with participating in the strike and that none of the appellants had called in or reported for duty as scheduled. H.T. at 79-82. The documentary evidence served to corroborate the Chief's testimony. The presiding official found the Center Chief's testimony to be credible, and appellants have failed to show that this finding should be disturbed.

Appellant Hatch argues, however, that it was improper for the presiding official to have assigned probative value to the documentary evidence submitted by the agency since said evidence was "unadulterated hearsay" and was "wholly insufficient" to support the agency's case. To demonstrate the unreliability of this evidence, appellant Hatch asserted that the time and attendance records were incorrect insofar as they showed that he was scheduled for duty on August 3 and 4, 1931. He

contends that he was scheduled for his regular days off on those dates and points to his answers to interrogatories posed by the agency in support thereof. Assuming *arguendo* that the appellant did have regular days off on August 3 and 4, the discrepancy complained of is essentially moot since appellant did not contest the accuracy of the documentary evidence showing that he had been scheduled to report for duty on August 5 and 6, 1981, and that he failed to so report.[5] Moreover, the Board has held that hearsay evidence is admissible in administrative hearings and that it remains for the presiding official to weigh the probative value of the evidence in light of the circumstances of the particular case. *Jackson* v. *Department of the Army*, MSPB Docket No. AT07528118273 (February 3, 1982); *Borninkhof* v. *Department of Justice*, 5 MSPB 150 (1981). We find that the presiding official did not abuse his discretion in admitting and assigning probative value to the documents submitted by the agency in view of the corroborative testimony of the Center Chief and the lack of rebuttal evidence offered by the appellants. Accordingly, the Board defers to the presiding official's assessment of credibility. *See Weaver* v. *Department of the Navy*, 2 MSPB 297-299 (1980). The evidence of appellants' unauthorized absence is sufficient to establish a *prima facie* case of their voluntary participation in the strike conducted by PATCO in accordance with the Board's holding in *Schapansky*, *supra*. The presiding official then found that appellants' failure to offer any reason for their failure to report to work, coupled with the agency's showing, constituted preponderant evidence of their participation in the strike and their unauthorized absence. Initial Decision at 4. Thus, we find that the presiding official

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[5] Appellant Moylan similarly argues that he was on his regular days off on August 4 and 5. However, it is also essentially moot in that he does not dispute that he was scheduled to report for duty on August 3 and 6, 1981, and that he failed to so report.

did not shift the burden of proof from the agency to appellants, and further, that the presiding official correctly determined that the agency supported the charges by a preponderance of the evidence.

Appellants next argue that it was error for the presiding official to have drawn an adverse inference from their failure to testify at the hearing since: (1) they had denied that they were AWOL or on strike in their responses to the agency's interrogatories; (2) the agency had not introduced probative evidence sufficient to establish a *prima facie* case; and (3) the Supreme Court has held in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), that disciplinary action may not be based exclusively on an employee's silence.

In this case, it is clear that the presiding official did not sustain the agency's action solely because appellants declined to testify; rather, this was merely one of many factors he considered. Moreover, assuming *arguendo* that the drawing of an adverse inference were impermissible, such a finding would have no impact on the result reached in this case since the record demonstrates that the charges were supported by a preponderance of the evidence absent the adverse inference. *See Schapansky, supra. See Adams* v. *Department of Transportation*, MSPB Docket No. NY075281F0424 at 14-15 (April 25, 1983).

In a related issue, appellants argue that it was also improper for the presiding official to have taken an adverse inference from their failure to answer certain interrogatories posed by the agency. This question need not be resolved since the initial decision does not reflect that the presiding official so ruled.

Appellants further allege that the presiding official erred in drawing an adverse inference from their failure to dispute the charges in their replies to the notices of proposed removal. The record reflects that the presiding

official did not draw such an adverse inference. Rather, he made a credibility determination based upon *Risner* v. *Federal Aviation Administration*, 7 MSPB 342 (1981), wherein the Board held that an appellant's failure to deny the charges when responding to the notice of proposed adverse action made his subsequent denial entitled to less weight. We find no error in this matter.

Appellants next contend that they were fired at 11:00 a.m. on August 5, 1981, that they were locked out at that time, and that they were, therefore, unable to report for their deadline shifts.[6] In support thereof, they cite: (1) various statements by the President and other government officials to the effect that striking controllers would be terminated if they did not return to work by 11:00 a.m. on August 5, 1981 (2) the Center Chief's public address to picketing controllers at 11:00 a.m. on August 5, 1981;[7] (3) the agency's practice of locking the facility gates after shift changes; and (4) the Center Chief's testimony that controllers who had been issued notices of proposed removal were not allowed to enter the facility.

Appellants' arguments are not persuasive. The Center Chief testified that all striking controllers would have been allowed to return to duty and the record shows that individual notices of proposed removal were not issued to striking controllers until after each controller had failed to report for his deadline shift. In these cases, appellants Hatch and Moylan were not issued notices of proposed removal until August 6, 1981, and appellant Noa was not issued such a notice until August 17, 1981, and

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[6] A striking controller's deadline shift was his first regularly scheduled shift after 11:00 a.m. on August 5, 1981.

[7] The Center Chief's entire speech was: "This is the Chief speaking. I'm sure you are all aware of the Presidential deadline of 11 a.m. Any of you who wish to report for work should go to the guardhouse, sign in, and you will be escorted into the facility" H.T. at 120.

thus they would not have been barred access to the facility until after those dates, respectively. Moreover, while the facility gates were indeed locked after shift changes, the Center Chief testified that the gates were open from 5:30 a.m. to 8:30 a.m. and from 2:00 p.m. to 4:30 or 5:00 p.m. each day for shift changes. H.T. at 120, 121. It is also noted that appellants did not claim that they had attempted to report for their deadline shifts and that they had been refused permission to enter the facility. Finally, the Board's holding in *Ketchem* v. *Department of Transportation, Federal Aviation Administration*, MSPB Docket No. DA075281F0713 (May 28, 1982), with respect to taking official notice of the existence of the strike (*see* discussion *infra* at page 13), of necessity encompasses the concept that all striking controllers were not fired as of 11:00 a.m. on August 5, 1981.

Appellants also contend that the agency erred in invoking the so-called "crime exception" to 5 U.S.C. § 7513 (b) in order to waive the thirty-day period of advance written notice of adverse action otherwise required under that provision. They claim that the agency had no reasonable cause to believe that they had committed a crime sufficient to justify its invocation. However, because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because appellants were absent from work, without explanation, during the strike, the Board finds that the agency had reasonable cause to believe that the appellants committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513 (b) (1) was justified. *Schapansky, supra,* at 7-8.

Appellants further claim that because the proposed removal notices required them to reply *within* seven calendar days, they were effectively denied their rights to "not less than seven days," to reply as provided by 5

U.S.C. § 7513(b)(2). However, the Board believes that a reasonable person receiving the notice as worded, would conclude that the seventh day of the cited time period was available for response, and that the appellants herein so interpreted it. *See Baracco* v. *Department of Transportation*, MSPB Docket No. DC075281F0895 at 8-9 (April 25, 1983). In any event, appellants have not attempted to demonstrate that any constructive reduction of the seven-day minimum, caused by the wording of the notice, resulted in harm to their ability to make an informed response. *Id. Cf. Kays* v. *Department of Transportation*, MSPB Docket No. CH075281F2014 (April 25, 1983).

Appellants Hatch and Moylan argue that the presiding official erred in finding that the strike continued until August 6, 1981. They cite President Reagan's statement, made at approximately 11:00 a.m. on August 3, 1981, that if the controllers did not report for duty within forty-eight hours they would be terminated, and Secretary Lewis' statement of August 5, 1981, that as of 11:00 a.m. on that date, "the strike is over." Appellants also moved that the Board take official notice of: 1) a number of other statements made by the President and other high-ranking government officials concerning the duration of the strike conducted by PATCO and 2) the fact that the strike concluded at 11:00 a.m. Eastern Daylight Time on August 5, 1981. In support of their contention that the strike ended on August 5, 1981, appellants also cite *United States* v. *PATCO*, 525 F. Supp. 820 (E.D. Mich. 1981), and *United States* v. *Haggerty*, 528 F. Supp. 1286 (D. Colo. 1981). In *Ketchem, supra*, the Board held that it would take official notice of the existence of an illegal strike conducted by PATCO beginning on August 3 and continuing through at least August 6, 1981. The arguments raised by appellants in these appeals were considered by the Board when it reached that decision. We can discern no reason to reconsider those arguments here.

Appellants argue, further, that their cases are distinguishable from *Ketchem* in that they were not apprised of their responsibility to return to work at their first assigned shift after 11:00 a.m. on August 5, 1981. We find that argument to be without merit. Appellant's deadline shifts have no bearing on the existence of a strike from August 3, 1981, through August 6, 1981.

Appellant Noa challenges the presiding official's finding that the strike continued at the Ronkonkoma facility until at least August 21, 1981.[8] The presiding official based his finding upon the facility chief's unrebutted testimony at the hearing that extensive picketing, including the carrying of placards, continued near the outer gate of the facility at least until August 21. In support of his challenge of that finding, appellant Noa cites the same statements of President Reagan and other high-ranking government officials, and the same case precedents as did appellants Hatch and Moylan. In addition, he refers to *United States* v. *PATCO*, 524 F. Supp. 160 (D.D.C. 1981), for the proposition that there was no strike after 8:00 a.m. on August 6, 1981. He also argues that there is no evidence that he acted in concert with others to withhold his services.

In *Ketchem*, *supra*, the Board held that when an employee is charged with participation in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that (1) the strike was in fact in progress on the dates charged and (2) the employee could have returned to work on that date. With

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[8] Appellant Noa was charged with striking and AWOL beginning at 3:00 p.m. on August 15 and continuing through August 17, 1981, when the notice of proposed removal was issued by the agency. There appears to be no dispute that he was on sick leave from August 2 to August 5, 1981, that August 6 and 7 were his regular days off, that he was on annual leave from August 8 through August 12, 1981, and that August 13 and 14 were also regular days off.

regard to the first of these criteria, we note that a plurality of actors is not a prerequisite to a finding of "concerted activity" for the purposes of Section 7 of the National Labor Relations Act.[9] In *Anchortank, Inc.* v. *NLRB*, 618 F.2d 1153, at 1160 (1980), the United States Court of Appeals for the Fifth Circuit held as follows:

> [T]he mere fact that an employee has acted alone does not preclude treatment of his action as concerted activity for mutual aid or protection under Section 7. *See, e.g., Richardson Paint Co.* v. *NLRB*, 574 F.2d 1195, 1207 (5th Cir. 1978); *Dreis & Drump Manufacturing Co.* v. *NLRB*, 544 F.2d 320, 328 (7th Cir. 1976). The words "concerted activities" in Section 7 constitute a term of art rather than a factual description. Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U.Pa.L.Rev. 152, 153-54 (1972). As a result, the determination whether a single employee's action is protected by

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[9] 29 U.S.C. § 157. That section provides, in pertinent part:

> Employees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Strike participation is clearly one of the concerted activities protected by this provision. *Brotherhood of R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, *rehearing denied*, 394 U.S. 1024 (1969); *NLRB* v. *Imperial Bedding Co.*, 519 F.2d 1073 (5th Cir. 1975). While striking by a Federal government employee is prohibited by statute, court interpretations of the term "concerted activity" under Section 157 provide us with guidance in determining whether striking, defined as the intentional withholding of services in concert with others, was in progress on a certain date. Therefore, they may be applied to the facts of this case regardless of the unprotected status of striking in the public sector. *See Duckett* v. *Tennessee Valley Authority*, MSPB Docket No. AT07528010325 at 5 (February 19, 1982). *Compare Campbell* v. *Department of Transportation*, MSPB Docket No. DE075281F0674 at 12-16 (April 25, 1983); *Martel* v. *Department of Transportation*, MSPB Docket No. BN075281F0558 at 8-10 (April 25, 1983).

> Section 7 turns on the "interpretation of the purpose and effect of such action and not upon the simple and more limited question of whether there was, in fact, action 'in concert.'" *Id.* at 154 (footnote omitted).

It has also been held that a single employee's activity is "concerted" for purposes of Section 7 whether or not group activity was contemplated, as long as the individual's activity contributed to a concerted effect. *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).[10] Therefore, we believe that the agency in this case, in order to demonstrate the continuation of the strike on a particular date, need not present evidence proving that there existed on that date a certain number of co-workers, mutually withholding their services prior to their deadline shifts, with whom appellant Noa could affirmatively interact.

Appellant Noa did not present any evidence with respect to the question of the duration of the strike other than the statements and precedents listed above. That evidence primarily supports the proposition that the strike ended on August 5 or at 8:00 a.m. on August 6, 1981. As noted above, however, the Board, explicitly rejected that argument when it took official notice in *Ketchem* that the strike continued at least through August 6, 1981.[11]

The agency relied exclusively on the testimony of the Center Chief to establish that the strike continued past August 6, 1981. He testified that approximately 90% of

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[10] As noted by the court in *Anchortank, supra,* at 1161, the Supreme Court seems to have adopted the *Interboro* approach to concerted activity in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[11] *See also United States* v. *Taylor*, 693 F.2d 919 (9th Cir. 1982), in which an air traffic controller was convicted of participating in the PATCO strike on August 8, 1981.

his air traffic controller employees were absent beginning on August 3, 1981, and continuing "well into September." H.T. at 62, 63. He further averred that persons carrying signs that said "PATCO Local 201 On Strike" had picketed his facility from August 3, 1981, through November of 1981. H.T. at 65, 70. We also note in this regard the supplemental opinion [12] of Chairman Houghton of the Federal Labor Relations Authority to that agency's decision to accept Chief Administrative Law Judge John H. Fenton's recommendation that PATCO's exclusive recognition status as representative of FAA air traffic controllers be revoked.[13] In that opinion, Chairman Houghton retracted his original dissent to the FLRA's October 22, 1981, decision, noting that PATCO had not disavowed the strike and and had made no attempt to end it as of November 3, 1981.[14]

However, appellant Noa also argues that because he had not been notified that he could return to work after August 5, 1981, he reasonably believed that he had been fired on that date and, therefore, he did not report for his scheduled duty shift on August 15, 1981, or at any time thereafter.[15]

Appellant's arguments lack credibility. The file contains a sample telegram sent to all employees at their

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[12] *PATCO* v. *Federal Aviation Administration*, 7 F.L.R.A. No. 10 (Nov. 3, 1981) (Supplemental Opinion of Chairman Houghton).

[13] *PATCO* v. *Federal Aviation Administration*, 7 F.L.R.A. No. 10 (Oct. 22, 1981). *See generally, PATCO* v. *FLRA*, 685 F.2d 547 at 551-556 (D.C. Cir. 1982).

[14] *See also, United States* v. *PATCO*, 527 F. Supp. 1344 (N.D. Ill. 1981), in which the court issued a preliminary injunction on November 11, 1981, restricting the place and manner of picketing by striking air traffic controllers.

[15] Appellant Noa, like appellants Hatch and Moylan, was informed of his scheduled duty shifts in late 1980 and again in July of 1981. H.T. at 45-47. Like them, he does not deny having such knowledge.

home address on August 3, 1981, which informed appellant that an illegal strike was in progress and directed him to report for duty for his scheduled shift unless directed otherwise by facility management. Although appellant claimed there was no proof that he had received this telegram, he did not testify or even claim that he had not received it. Moreover, Louis DeLuca, Assistant Chief, New York Center, mailed a letter to appellant on July 31, 1981, instructing appellant to telephone the center no later than 7 a.m. on August 3, 1981, to see if his leave were still approved. Appellant's Hearing Exhibit 12. Again, appellant did not testify or otherwise claim he had not received this letter.

The agency also showed that appellant Noa would have been allowed to return for his scheduled duty shift on August 15, 1981. The Center Chief testified that all of the appellants would have been allowed to report to work on the days on which they were charged with striking and unauthorized absence. H.T. at 80. Although he admitted that the facility guards were given lists of employees who were not to be allowed to enter into the facility, he asserted that the appellants' names were only given to the guards after their respective notices of proposed removal were issued. Finally, appellant did not contend that he had attempted to return and been denied permission to do so.

On consideration of the record, and in light of the foregoing, we find that it is more likely to be true than not true that the strike continued at least until August 17, 1981, and that appellant's absence was due to his participation therein rather than his alleged belief that he had been terminated on August 5, 1981. Consequently, we find that the agency in this case has met its burden of proof of appellant Noa's participation in the strike on the dates charged, as set forth in *Ketchem, supra.*

Finally, appellants argue that the presiding official erred in finding that their removal promoted the offi-

ciency of the service and was reasonable as mandated by statute. They base their argument on the further assertion that the agency has failed to substantiate the strike participation charges against them and that they were guilty, at most, of AWOL on the dates in question. However, we have determined herein that the agency has supported all of its charges by a preponderance of the evidence. Consequently, in light of our decision in *Schapansky, supra*, at 9-12, we find that the penalty of removal in this case cannot be deemed clearly excessive or disproportionate to the sustained charges, and was for such cause as would promote the efficiency of the service as required by 5 U.S.C. § 7513(a).

*Conclusion*

Accordingly, the initial decision of the presiding official, dated October 14, 1982, is hereby AFFIRMED with respect to appellants Noa, Hatch and Moylan.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellants are hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after appellants' receipt of this order.

April 25, 1983 (Date) — /s/ Herbert E. Ellingwood
HERBERT E. ELLINGWOOD
Chairman

April 25, 1983 (Date) — /s/ Ersa H. Poston
ERSA H. POSTON
Vice Chair

April 25, 1983 (Date) — /s/ Dennis M. Devaney
DENNIS M. DEVANEY

Washington, D.C.

## APPENDIX C

## STATUTORY PROVISIONS INVOLVED

**5 U.S.C. § 7311.**

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

**5 U.S.C. § 7513.**

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affi-

davits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

**5 U.S.C. § 7701.**

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

**18 U.S.C. § 1918.**

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day or both.

## APPENDIX D

## RESPONDENT'S RESPONSE TO NATIONAL INTERROGATORIES

**Interrogatory No. 20**

Does the FAA deny that it has the authority and/or discretion to impose a punishment other than removal on employees found to have participated in a strike against it? If so, state the basis for such denial, and explain why many federal employees who have participated in a strike have not been removed.

*Response*: Respondent has made no determination as to whether it had the authority to impose a punishment other than removal. Respondent, however, determined as a matter of policy, that all individuals found to have participated in the unlawful strike would be removed. (See November 13, 1981, letter from Administrator J. Lynn Helms to Congressman William D. Ford.) (Attachment V.)

* * * *

**Interrogatory No. 22**

Was it the FAA's policy that air traffic controllers who missed or were late for their first scheduled shift beginning after 11:00 a.m. EDT, August 5, 1981, would not be allowed to report to work pending disciplinary action against them? If so, state what pay and duty status such controllers occupied pending their removal, and state why such controllers were not allowed to return to work pending their removal. If not, state the policy regarding the status of such controllers pending disciplinary action against them.

*Response*: It was respondent's position that an air traffic controller who failed to timely report for his/her first scheduled shift after 11:00 a.m. EDT, Au-

gust 5, 1981, would not be allowed to report to work pending the completion of disciplinary action against him/her, and that such persons would be carried in non-pay, non-duty status pending the completion of such action. The decision to maintain these persons in non-duty status was in consideration of the safety and welfare of the working controllers staff and to prevent any further disruption of air traffic services or threats to air safety. This policy is set forth in GENOT 130, which is already available to lead counsel, having been produced pursuant to ALJ-1.

Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS
CLERK

No. 84-258

# In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. SCHAPANSKY, ET AL., PETITIONERS

*v.*

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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ROY L. SCHAPANSKY, ET AL., PETITIONERS

*v.*

DEPARTMENT OF TRANSPORTATION,
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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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Petitioners contend that their removal from positions as air traffic controllers was procedurally improper.

1. The underlying facts are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation,* No. 84-78, another petition arising out of the air traffic controllers' strike.[1] Petitioners were among the more than 11,000 air traffic controllers who participated in a nationwide strike against the United States in 1981. As a result, they were removed from their positions by the Federal Aviation Administration. Following their removal, petitioners appealed to the Merit Systems Protection Board,

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[1]A copy of our response in *Campbell* has been sent to counsel for petitioners. One other petition arising out of the air traffic controllers' strike is currently pending. *Anderson* v. *Department of Transportation,* No. 84-259.

where they were afforded hearings. The presiding officials sustained their removal and the full Board affirmed. Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. Theirs were among nine appeals treated as "lead cases" by the court of appeals, while more than 3,000 other appeals were stayed pending the decisions in the lead cases. On May 18, 1984, a five-judge panel of the court of appeals issued eleven decisions in the nine lead cases, affirming the removal of petitioners and, with one exception, each of the other air traffic controllers whose claims were presented. See 84-78 Br. in Opp. 2-4.

2. All of the questions presented in this petition were also presented in the petition in *Campbell*. The decision of the court of appeals in *Campbell* (84-78 Pet. App. 1-14; 735 F.2d 497), moreover, was issued on the same day as and relied extensively on the very decisions that petitioners now ask this Court to review. The Court denied certiorari in *Campbell* on October 9, 1984, and petitioners have not presented any basis on which to distinguish their claims or any independent reason justifying review. Accordingly, the petition should be denied.

Petitioners contend that they were improperly allowed less than seven days to respond to the notices of proposed removal (Pet. 8-13, 22-23), that there is a conflict with respect to whether removal is the mandatory penalty for engaging in a strike against the United States and that the court of appeals failed to consider mitigating factors in affirming the penalty (Pet. 13-19, 23-29), and that the court erred in its allocation of the burden of proof with respect to their participation in the strike (Pet. 19-21).[2] Our response

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[2]Petitioners also suggest (Pet. 6 & n.3) that the court of appeals believes that the case is worthy of this Court's consideration and that the petition is likely to be granted. This suggestion is baseless. The court of

in *Campbell* addresses each of these arguments (84-78 Br. in Opp. 9, 10-12, 5-8).[3]

For the foregoing reasons and those expressed in our response in *Campbell* v. *Department of Transportation*, No. 84-78, it is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

OCTOBER 1984

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appeals stayed proceedings pending final disposition of the lead cases as a matter of orderly case management; its "Notice to Counsel and Petitioners in Air Traffic Controller Litigation" nowhere evinces the position petitioners would ascribe to the court.

[3]Petitioners' contention (Pet. 23-29) that the Board and the court of appeals improperly failed to consider mitigating factors is meritless. To the contrary, both the Board (Pet. App. 73a-74a) and the court (*id.* at 12a-14a) addressed the question of mitigation, and concluded that the offense committed by petitioners — engaging in an illegal strike designed to cripple the nation's air transportation system — was so serious that the mitigating factors raised by petitioners could not justify reducing the penalty. This analysis is fully in accord with the precedents of both tribunals. See *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313 (1981); *Nagel* v. *Department of Health & Human Services*, 707 F.2d 1384 (Fed. Cir. 1983). Finally, petitioners' argument (Pet. 15, 18-19, 26-29) that all striking air traffic controllers must receive the same penalty is erroneous: an unevenly applied sanction is not for that reason alone invalid (*Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 188 (1973)) and in any event, as the court of appeals noted (Pet. App. 14a), all similarly situated controllers did in fact receive the same penalty.

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No. 84-258

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. SCHAPANSKY, *et al.*,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITIONERS' REPLY MEMORANDUM

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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The central, and almost exclusive, point in respondent's 3-page brief in opposition is the following misinformed statement: "The Court denied certiorari in *Campbell* on October 9, 1984, and petitioners have not presented any basis on which to distinguish their claims or any independent reason justifying review." Br. in Opp. 2. In addition, it is obvious error for respondent to state that, "All of the questions presented in this petition were also presented in the petition in *Campbell* [*v. Department of Transportation*, No. 84-78]." [1] The peti-

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[1] For example, neither the petition nor the opposition in *Campbell* mentions the significant issues raised in question 5 in the petition herein. Supreme Court Rule 21.1(a) provides that "Only the questions set forth in the petition or fairly included therein will be considered by the Court." Therefore, the Court, in denying the

tion herein presented differing issues; it focused on relevant conflicts among and between the circuit courts, and it highlighted suggestions and requirements of this Court that favor certiorari review under Sup. Ct. R. 17.1—none of which were mentioned in the *Campbell* petition or respondent's oppositions in *Campbell* or the present case.[2]

Furthermore, respondent mischaracterizes a conflict that *is* discussed in the petition herein and the *Campbell* petition. Respondent's opposition in *Campbell*, which it relies upon herein, claims that in *United States v. McCubbin*, No. 81-2059 (10th Cir. Aug. 22, 1983)—

> a reasonable doubt existed with respect to the defendants' failure to obey a back-to-work order because their absences could have been due to resignations rather than participation in the strike. Here, by contrast, petitioners have not argued that their removal was improper because they had resigned first.

*Campbell* Br. in Opp. 7-8 n.6. In *McCubbin*, a decision involving the same August 1981 PATCO strike involved

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petition for certiorari in *Campbell*, could not have considered questions that were not included therein, but which were included in the petition herein. "Rule 23(a)(c) [21.1(a)] means that the Court will generally limit its consideration of the case 'to the question specifically brought forward by the petition.' *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-178." R. Stern & E. Gressman, *Supreme Court Practice* 457 (5th ed. 1978) (footnote omitted).

[2] *E.g.*, Pet. i, 11-12 (discussion of *Ommaya v. National Institute of Health*, 726 F.2d 827, 830-31 & n.5 (D.C. Cir. 1984) and the principles enunciated in *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); Pet. i, 13-15 (conflict involving the present case, *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) and *Parsons v. Department of the Air Force*, 707 F.2d 1406, 1410, 1412 (D.C. Cir. 1983).

in this case, the Tenth Circuit did not even mention a "resignation" factor or analysis, no less rely upon it.[3]

Moreover, respondent's attempt to equate this case with *Campbell* ignores a critical factual distinction with regard to the shortened notice period provided to petitioner Baracco in the present case. The *Campbell* decision, petition and opposition depend upon whether notices requiring a response "within seven calendar days after you receive this letter" violate the statutory entitlement to "a reasonable time, *but not less than 7 days*" to respond. 5 U.S.C. § 7513(b)(2) (emphasis added); *Campbell* Pet. 19; *Campbell* Br. in Opp. 9; *Schapansky* Br. in Opp. 2-3. As discussed in Judge Nies' concurrence below, Pet. App. A 34a-36a, and the petition herein at 10 & n.7, this issue is inapplicable to petitioner Baracco; the Merit Systems Protection Board found correctly that the agency *erred* by actually providing him less than a period indisputably below the irreducible statutory minimum number of days to reply to charges.

Finally, of course, the Court's denial of the *Campbell* petition for certiorari lacks precedential value with respect to the petition herein.[4] The Court has not hesi-

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[3] Respondent's misreading of *McCubbin* appears to evolve from its confusion in the briefs below of *McCubbin* and *United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982); this misreading was adopted by the court of appeals, Pet. App. 25a. Only *Martinez* involved any reference to a possible "resignation" analysis, and *McCubbin* did not cite *Martinez*. *See* Pet. 19-21.

[4] The petition herein was filed and hand-delivered to respondent on August 16, 1984. Prior to its September 17, 1984 deadline herein, respondent sought a 30-day extension of time. Respondent then filed a 3-page opposition herein, on October 18, 1984 (received by petitioners in the mail on October 23, 1984). Apparently, respondent "needed" 63 days to write its opposition herein, despite the fact that it relies almost exclusively on its *Campbell* opposition, which was filed on September 12, *before* respondent's initial deadline herein. The effect of these tactics was to delay distribution to the Court of the petition herein until the Court acted upon the limited and distinguishable petition in *Campbell*. If the *Campbell*

tated in proper cases to grant certiorari even after denying similar petitions in related cases or even in the same case.[5]

For the foregoing reasons and those expressed in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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petition were as similar to the petition herein as respondent's current opposition would have the Court believe, it is curious that respondent had to request and fully utilize such a lengthy extension of time to file its slim *"see Campbell"* opposition.

[5] It is well-settled that denial of certiorari does not imply the Court's view of the merits. *Hathorn v. Lavorn*, 457 U.S. 255, 262 n.11 (1982) (previous denial of petitioners' petition for a writ of certiorari does not preclude Court from examining questions decided in lower courts); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (prior dismissal of certiorari as improvidently granted did not establish law of the case nor amount to res judicata on the points raised). Hence, a denial is not a precedent for like action in a similar case; nor is it authority which may properly be cited in support of any proposition of law. R. Stern & E. Gressman, *Supreme Court Practice* 345 (5th ed. 1978). *See, e.g., Polites v. United States*, 364 U.S. 426, 433 n.9 (1960) (petition for certiorari granted although certiorari was previously denied in three cases involving similar issues).